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CONFLICT OF LAWS STRUCTURE AND VISION: UPDATING A VENERABLE DISCIPLINE

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INTRODUCTION

Conflict of Laws presents opportunities for meaningful reflection on legal regulation and governmental structure. But that's just the beginning. In the course of resolving conflicts issues, legal thinkers can develop a deep understanding of the nature of law itself. While traditional conflicts thinking and pedagogy may have at one time fulfilled this promise, it now fails. As a result, many perceive the field as arcane, dry, and possibly even irrelevant.[1] Conflict of Laws is none of these things. To begin with, Conflict of Laws doctrines control some of the most compelling issues of our time: same-sex marriage,[2] internet regulation,[3] and mass tort litigation,[4] to name just a few. Equally important, Conflict of Laws presents a vehicle for studying issues related to globalism, world governance, and the changing nature of law practice.[5] After all, if a legal problem is answered with clashing regulations from different jurisdictions, this

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1. *E.g.*, Annelise Riles, Managing Regulatory Arbitrage: A Conflict of Laws Approach, 47 CORNELL INT'L L.J. 63, 66 (2014): "The technical, arcane, legal techniques known in the civil law world as Private International Law or, in the common-law world as the Conflict of Laws ("Conflicts") . . . ."

2. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997).

3. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1212–13 (1998) (discussing the feasibility of national regulation of cyberspace, conflict of laws, and other "tools available to resolve multijurisdictional cyberspace conflicts."); Laura E. Little, *Internet Choice of Law Governance*, China Private Int'l Law F. (2012), *available at* http://ssrn.com/abstract=2045070 (arguing that internet governance issues require heightened attention and consideration of specialized rules).

4. *See, e.g.*, Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 551 (1996) (discussing choice of law concepts in complex litigation).

5. *See, e.g.*, Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 Wayne L. Rev. 1105 (2005).

is a sign that the problem is important and difficult. The existing texts in the field, including scholarly articles, casebooks, treatises, and other monographs, tend to fall short in using Conflict of Laws to highlight its importance and explore its contemporary contexts. The discipline needs reinvigorating.

This is a message important to all legal thinkers who might encounter Conflict of Laws: legislators, judges, legal scholars, law professors, practitioners, and law students. This essay highlights some remarkable insights that Conflict of Laws issues provide to this wide audience. The essay provides raw material for scholars and practicing lawyers, who stand to benefit from these issues and have the ability to raise the consciousness of others about their contemporary importance. Riding on the hope of the next generation, this essay also focuses on pedagogy with ideas on how to highlight the issues in courses on Conflict of Laws, International Civil Litigation, and other procedural courses.[6]

Why does the study of Conflict of Laws hold such promise in penetrating the essence of legal regulation and governmental structure? Choice of law issues present profound clashes among the rules that regulate human life. To choose which of those rules should actually exert control, legal thinkers must identify first-order principles that inform the rules' content and empower rules to regulate human affairs. Whether society likes it or not, humans possess egos and relish power, even if it is only the power to control self-destiny. Inescapable power struggles and the challenges of compromise are put in sharp focus when framed in legal rules. One might imagine that a legal shroud might sober the power struggles, reducing the emotional distraction and confusion. Whether or not this calming effect occurs when lawyers and judges resolve Conflict of Laws questions in legal practice and litigation, the emotional and

6. In this way, this essay expands on and updates valuable literature from the 1990s. In 1996, the Toledo Law Review ran a symposium on teaching Conflict of Laws. *See generally* Symposium, *Conflict of Laws*, 27 U. TOL. L. REV. 577 (1996). Other articles on conflicts pedagogy have sporadically appeared. *See generally* William L. Reynolds, *Why Teach International Family Law in Conflicts?*, 28 VAND. J. TRANSNAT'L L. 411 (1995); Gene R. Shreve, *1992 Survey of Books Relating to the Law; VII. Choices of Law and Remedy: Teaching Conflicts, Improving the Odds*, 90 MICH. L. REV. 1672 (1992) (reviewing DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS (1990)).

psychological underbelly of Conflicts provides an important opportunity for understanding power struggles. More importantly, for the purposes here, emotional and psychological angles bring rules alive and thus provide a key teaching vehicle. By highlighting the "human side" of Conflicts, the Conflict of Laws scholar, teacher, and practitioner can provide her audience with an important and interesting angle.

Simply presenting Conflict of Laws' jurisprudential questions in abstract form can overlook this human side of the discipline and fail to engage the audience. Plain words about the emotional, contemporary, and practical implications of Conflicts doctrine can help hook the listener. Yet the profound, abstract questions that comprise Conflicts of Laws are what the discipline make so important. The challenge then is to navigate a balance between the two angles, seeking to capture both the practical and theoretical richness in the subject matter.

For teaching, most existing casebooks squander the promise of Conflicts as a tool for broad understanding.[7] This loss derives from a number of different mistakes. Many texts rely heavily on older cases that fail to captivate the modern imagination. Others miss thematic threads binding the discipline, either because the texts embrace an encyclopedic presentation or trace the development of Conflicts through long lines of cases. Finally, texts lose students' interest and understanding when the students perceive the textual discussion as entangled in a maze of abstract analysis or as pursuing an elusive, "hide the ball" approach with the material. The plodding, evolutionary approach of many presentations of Conflict of Laws, such as when many texts trace a long line of cases, can exacerbate this perception. The result can be low enrollments and low student interest. While distressing for the purposes of legal knowledge and global understanding, this is also problematic for another basic reason: the subject is on the bar examination in twenty-six states and

7. I note that I have a dog in this hunt: LAURA E. LITTLE, CONFLICT OF LAWS: CASES, PROBLEMS, AND MATERIALS (2013). Indeed, this essay springs from thoughts I developed during the several years—steeped in conflicts material—I wrote that book.

the District of Columbia.[8] Most importantly, uninspired pedagogy makes creative legal advocacy and cutting-edge scholarship less likely. If future lawyers and academics do not experience the promise of Conflict of Laws analysis during their formative stages, they are less likely to push the discipline in new directions that accommodate changes in the legal, social, and technological landscapes.

Conflict of Laws pedagogy and scholarship benefit from emphasizing current problems, highlighting themes that integrate the subject matter (and tether it to current challenges), identifying specific topics that expose the subject's relevance, and exploring lawyering skills easily integrated with Conflicts. The subject naturally presents opportunities to present cutting-edge issues of

8. *Alabama Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/njnjz/al.pdf (last visited Oct. 27, 2014); *Arkansas Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/fjywq/ar.pdf (last visited Oct. 27, 2014); *Colorado Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/ztq4f/co.pdf (last visited Oct. 27, 2014); *Connecticut Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/zg3m2/ct.pdf (last visited Oct. 27, 2014); *District of Columbia Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/d4mmv/dc.pdf (last visited Oct. 27, 2014); *Hawaii Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/2fgqx/hi.pdf (last visited Oct. 27, 2014); *Idaho Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/2zjmz/id.pdf (last visited Oct. 27, 2014); *Illinois Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/mm3zm/il.pdf (last visited Oct. 27, 2014); *Iowa Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/my2fd/ia.pdf (last visited Oct. 27, 2014); *Kentucky Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/zb9nd/ky.pdf (last visited Oct. 27, 2014); *Maine Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/jg5zg/me.pdf (last visited Oct. 27, 2014); *Michigan Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/ynjhm/mi.pdf (last visited Oct. 27, 2014); *Mississippi Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/k4mgm/ms.pdf (last visited Oct. 27, 2014); *Missouri Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/4ymg4/mo.pdf (last visited Oct. 27, 2014); *Nebraska Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/m2gxy/ne.pdf (last visited Oct. 27, 2014); *Nevada Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/zgyzf/nv.pdf (last visited Oct. 27, 2014) *New Hampshire Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/fdc5n/nh.pdf (last visited Oct. 27, 2014); *New York Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/hndnh/ny.pdf (last visited Oct. 27, 2014); *North Dakota Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/nzbkf/nd.pdf (last visited Oct. 27, 2014); *Oklahoma Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/jyxfd/ok.pdf (last visited Oct. 27, 2014); *Pennsylvania Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/fgczm/pa.pdf (last visited Oct. 27, 2014); *Rhode Island Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/2rjzt/ri.pdf (last visited Oct. 27, 2014); *Tennessee Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/hmdyx/tn.pdf (last visited Oct. 27, 2014); *Utah Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/rdfdb/ut.pdf (last visited Oct. 27, 2014); *Virginia Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/yztgw/va.pdf (last visited Oct. 27, 2014); *West Virginia Subjects Listed*, U. WIS. L. SCH., https://media.law.wisc.edu/s/c_679/dqxnz/wv.pdf (last visited Oct. 27, 2014).

family law, internet regulation, international regulation, and the like.[9] In addition, litigation strategy issues (such as international forum shopping)[10] as well as transaction practice issues (such as private ordering of affairs and contractual choice of law clauses)[11] are important components of Conflicts thinking. Limitless ways exist for situating these issues and practical concerns within the deeper, jurisprudential issues of power that make Conflict of Laws so important. I present here a handful of particularly compelling examples, organized around the following three themes:

I. The Nature of Law: What forms does legal analysis take? How does Conflicts disclose a societal preference for judicial, rather than legislative power?

II. Federalism: What topics best illustrate the challenges and advantages of federalism? What does Conflict of Laws reveal about modes of regulation among the constituent parts of a federalist system? What lessons, opportunities, and concerns arise from federalism's creation of forum choice for litigants?

III. Globalism: How should courts resolve transnational conflict among laws? What does Conflicts tell us about the diversity in world litigation systems? What is the relationship between International Law and Conflict of Laws?

I take up each of these themes in turn.

I. USING CONFLICT OF LAWS TO REVEAL THE NATURE OF THE LAW

The first order of business in invigorating Conflict of Laws is to harness and expand on the great scholarly literature identifying both regulatory analysis within Conflicts doctrine as well as the regulatory effects of various Conflict of Laws approaches. With the help of Conflicts material—and just a little nudging—one can discover what

9. *See generally* Kramer, *supra* note 2.

10. *See e.g.*, Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 Tex. Int'l L.J. 559 (2002).

11. *See e.g.*, Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l L. 571, 589 (1999).

law seeks to accomplish and can observe some of the intended and unintended regulatory effects of law. Focusing on the form of conflicting regulations as well as Conflict of Laws analysis itself, Conflicts thinkers can also gain powerful insights about the forms that legal regulation and analysis can take—including both salutary forms and regrettable ones. This second angle includes a cornucopia of different analytical forms illustrated in Conflicts problems—as well as the unique insights into modes of legal reasoning and rhetoric in the subject's case law. The forms of analysis reflected in Conflicts provides an opportunity to ponder the propriety of such matters as (i) an intuitive approach to law, (ii) the effectiveness of formalism and the related debate about rules and standards, (iii) the power of framing—and its embrace in the process of characterization formally integrated in the Restatements (First) and (Second), and (iv) the discipline's propensity for complexity. A final significant topic about the nature of law arising from Conflicts concerns what one might describe as a preference for judicial, rather than legislative or executive power. This is reflected in the sanctity of judgments and the exalted role of judges in the Anglo-American tradition.

A. Regulatory Goals and Effects

The *choice* of laws component of the *Conflict* of Laws discipline invites legal thinkers to dissect legal principles like no other subject. Regardless of the particular choice of law approach discussed, the analysis required uncovers many insights about the regulatory goals and effects of law. I do not suggest this is a new observation. But the process of developing a basic understanding of the complex and usually abstract, principles of choice of law doctrine can easily distract from the range of regulatory goals and effects depicted in Conflicts cases. For newcomers to the discipline, the process of learning the complex and abstract choice of law principles can be so challenging that they overlook larger lessons from the material. It is worth a second look to discover what choice of law analysis can uncover.

1. Regulatory Goals

Regulatory goals drive much choice of law analysis. Contemplating Conflict of Laws itself thus presents analysts with an opportunity to self-consciously identify and consider the policy preferences imbedded in legal principles. Those grappling with choice of law need to remind themselves—repeatedly remind themselves—of these transcendent messages from the choice of law cases.

For illustrating law's regulatory goals, the most obvious methodological examples are Governmental Interest Analysis and the Restatement (Second) of Conflict of Laws, both of which explicitly invite the analyst to identify policy goals behind legal principles in resolving a law conflict.[12] Beyond simply reminding legal thinkers that laws are generally made for an instrumental reason, this process of goal identification can disclose repeated regulatory patterns. For example, from the observation that one purpose of a law is victim compensation, one might inquire into the prudence of pursuing restorative justice and of designing law to implement the rightful position principle.[13] Likewise, one might expand the observation that a law seeks to hold blameworthy wrongdoers responsible for their actions to include consideration of deterrence policies as well as a government's resolve to channel and control retributive instincts.

Those initially confronting Conflicts thinking often unquestioningly accept the default of forum law governing any dispute before a forum court, viewing the principle as either a predetermined fact of nature or an irrefutable "rule of the road," necessary to keep the gears of a litigation system turning.[14] Yet, questioning why the forum law default rule might exist—or exploring it in the context of the *lex fori* choice of law approach—

12. *See, e.g.*, CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 65–79, 104–05 (2010) (discussing policy components of Governmental Interest Analysis and Restatement (Second) of Conflict of Laws).

13. That is, the principle that the purpose of civil law is often to put the injured party in the position that she would have been in but for the harm.

14. *See, e.g.*, Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "*Lex Loci *Approach,"* 18 OKLA. L. REV. 340, 348–50 (1965) (explaining that domestic law should govern unless a forum law is required by some choice of law principle).

opens questions about where courts derive their authority to apply *any* law and whether they may legitimately enforce policy preferences of a foreign jurisdiction. These issues in turn invite consideration of a court's obligation to respect legal products of its home jurisdiction's democratic processes.[15]

Other choice of law approaches bring out important systemic themes that serve as interesting foils for (what are traditionally called) "substantive" policy goals. Take, for example, the Restatement (Second) of Conflict of Laws and Leflar's Choice Influencing Considerations.[16] Both approaches make reference to "predictability of results," "maintenance of interstate and international order," and "simplification of the judicial task."[17] These factors provide an opportunity to explore the idea of what it means for a court to "decide specific cases justly."[18] Newcomers to Conflicts thinking are likely to willingly accept the notion that procedural and systemic values have an important place in the resolving parties' disputes over their personal rights. Further guidance can come from an existing body of Conflicts writing—distinguishing between "conflicts justice,"[19] and "material" or "substantive" justice[20]—that explores the complicated

15. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 41–45 (5th ed. 2010) (reviewing rationales behind the *Lex Fori* approach).

16. LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 379–86 (2013) (discussing the systemic factors of the Leflar's approach and the Restatement (Second) of Conflict of Laws).

17. SPILLENGER, *supra* note 12, at 114 (noting that overlap of systemic choice influencing considerations between Leflar's approach and Section Six of the Restatement (Second) of Conflict of Laws).

18. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 189–194 (1933).

19. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 959–60 (1983). When courts pursue "conflicts justice" they seek to ensure they apply the law from the proper state, and evaluate systemic values such as the needs of judicial systems, uniformity of results, avoiding forum shopping, predictability, and the court's ease of determining the applicable law. *See, e.g.*, *id.*; Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 348–50 (1974).

20. Symeon Symeonides, *Result-Selectivism in Conflicts Law*, 46 WILLAMETTE L. REV. 1, 1 (2009). "Material justice" and "substantive justice" refer to the results courts seek in wholly domestic cases—without regard to concern with conflicting jurisdictions or multijurisdictional elements. *Id.* Gerhard Kegel explains "substantive law aims at the *materially* best solution, [conflicts law] aims at the *spatially* best solution." Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 616 (1979). Some scholars argue that courts have the

interrelationship among the details of a procedural system and its ultimate goals. Thus, further reflection reveals that a choice of law methodology acts as a procedural system that promotes policies related to the governmental system itself as well as policies that seek to impact private, out-of-court conduct.

Even the classic territorial approach of the Restatement (First) of Conflict of Laws sheds unique insights into regulatory goals and their relationship to parties' rights.[21] The First Restatement approach focuses more on events than legal policies in resolving choice of law disputes—thus providing an important lesson about territorialism and sovereignty. Nonetheless, the First Restatement's emphasis on events places the role of law's policies in perspective.[22] Some may cling readily to the notion of fulfilling a particular law's "substantive" purposes, but the First Restatement reveals other matters of justice and expectation that bear serious attention. For example, picking up on this wisdom from the First Restatement, Professor Perry Dane identified a "Norm-Based view of the law:"

> Particular legal norms may be promulgated to achieve any number of goals—such as maximizing utility, wealth, or fairness; . . . Once promulgated, however, a legal norm becomes part of a normative system that determines the legal status of various events and conditions in human life. According to the Norm-Based view of law, the reason for applying that norm in any particular case is not so much to achieve the underlying goal of the norm, but to uphold the normative system itself and the rights and duties created by that system.[23]

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same duties of fairness and justice when adjudicating multijurisdictional cases justly as they do in wholly domestic cases—and that resolving disputes in a "manner substantively fair and equitable to litigants should be an objective of conflicts law as much as internal law." Symeonides, *supra* at 20. In the context of a choice of law determination, "substantive" or "material" justice authorizes a court to scrutinize the competing laws to evaluate which produces the most just result in the case. *Id.*

21. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1279, 1281, 1285, 1291 (1989).

22. *See, e.g.*, *id.* at 1292 (explaining that torts cases were governed by the location where the case's issue occurred to determine the governing territorial laws).

23. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1218 (1987).

Although the increasing rise of globalism and dominance of cyberspace casts doubt on the utility of territorialism in solving legal problems, territorialism continues to exert strong control over legal analysis. For that reason, legal thinkers continue to benefit from understanding how the territorial approach's focus on the geographical location of events privileges governmental sovereignty and individual expectations, which formal legal definition creates. These are important governmental lessons pertinent to developing greater understanding of federalism and internationalism, discussed below.

In addition to the policy mechanics of choice of law approaches, another key topic implicating regulatory goals is party autonomy, a concept fully exposed by choice of law and choice of forum clauses. Reflected in questions about waiver, arbitration, and mediation, private ordering of affairs has taken on considerable importance in today's procedural law.[24] Party autonomy in the choice of law field is no exception.[25] Appreciation of party autonomy issues requires one to understand that allowing parties to designate which law governs their affairs (and the forum for adjudicating their fights) can enable parties to select their preferred regulatory constraints, thereby empowering them to circumnavigate precisely those regulatory goals that were designed to govern them. Conflict of Laws thus provides an apt medium for appreciating government sovereignty (in the form of laws implementing public policy goals) as a check on private rights to designate which norms govern individual behavior. Indeed, consideration of whether courts should enforce choice of law clauses

24. For examples of the burgeoning literature on private ordering in the context of litigation systems, see Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An* Ex Ante *Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013) (focusing on an analysis of public implications of pre-dispute and post-dispute modifications of procedure in litigation).

25. The Brilmayer, Goldsmith, O'Hara O'Connor casebook, *Conflict of Laws: Cases and Materials*, is particularly strong on the interdisciplinary presentation of the economics of conflict of laws doctrine. BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 637–787 (6th ed. 2011). For further materials on this topic, see, for example, Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Erin A. O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 GEO. L.J. 941 (2002); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).

without restriction squarely presents the question of whether routine, private regulation might shatter a sovereignty-based system of regulation.

2. *Regulatory Effect*

Complementing the wealth of learning available on the role of regulatory goals in Conflict of Laws are illustrations of laws' intended and unintended regulatory *effects*. One might analyze these effects using Conflict of Laws doctrines in connection with social science theory, such as behavioral economics.[26] Consider two case studies: the first uses a choice of law approach itself—*Lex Fori*—as a starting point for analyzing efficiency; the second—the "race to the bottom" concept—illustrates the intersection between choice of law and regulatory incentives among states. Here are some details.

a. *Case Study: Lex Fori*

Most legal thinkers readily appreciate the upsides and downsides of *Lex Fori*. As for the upside, *Lex Fori* presents a potent, straightforward default: Forum law should apply when a conflict exists.[27] One can certainly embrace the ease of this methodology. One can also readily see its problems in promoting forum shopping and disrespect for sister state sovereignty. But it pays to probe deeper: *Lex Fori* presents the opportunity to push beyond the obvious so as to discover insights beyond surface incentives.

One can start by asking about possible efficiency benefits of the *Lex Fori* approach. Starting on a micro level, one might observe that *Lex Fori* is surely predictable and uncomplicated for individual actors in the litigation system. Forum law is undoubtedly the law that courts and local attorneys know best—the law they can more

26. *See, e.g.*, Michael E. Solimine, *Social Science Perspectives on Teaching Conflict of Laws*, 27 U. TOL. L. REV. 619 (1996) (explaining ways to integrate law and economics into Conflict of Laws teaching). For a particularly useful compilation of articles presenting various law and economics angles on Conflicts of Laws, see generally ERIN O'HARA O'CONNOR, THE ECONOMICS OF CONFLICT OF LAWS (2007).

27. BLACK'S LAW DICTIONARY 425 (3d pocket ed. 2006).

accurately follow and apply as intended. Moreover, when local law is accurately applied and knowledgeably explained, useful precedent is likely created, thereby broadening and clarifying forum law. If parties know that forum law is most likely to govern transactions, they benefit from the certainty of that knowledge and are well poised to achieve efficient transaction results so long they can avoid inefficient laws by enjoying latitude to choose the forum for any resulting lawsuit. Finally, the specter of potentially competing laws in other jurisdictions may foster legal efficiency to the extent that lawmakers respond to this competition by fine-tuning their jurisdiction's regulatory rules.[28]

Now some of the downsides of *Lex Fori*: while individual litigants and single-jurisdiction actors may find that *Lex Fori* fosters predictability, multijurisdictional actors will not because the approach allows different laws to govern, depending on where the lawsuit is filed. And of course forum shopping occurs as well, since plaintiffs are likely to file in jurisdictions with the most favorable governing law as well as reputations for beneficial procedures and large verdicts. Forum shopping might also lead to short-term inefficiencies where plaintiff-favorable jurisdictions are unprepared for disproportionate numbers of filings.[29] No matter how one comes out on the questions of efficiency, the process of evaluating competing arguments exposes intended and unintended consequences of legal regulation.

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28. *See, e.g.*, Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1372 (2004) (reasoning as follows: "Predictability about the use of forum law reduces uncertainty for parties structuring transactions. As long as parties can exit the system, the *lex fori* approach forces a state to internalize the external costs of bad laws, promoting competition among jurisdictions to improve substantive law.").

29. *Id.* at 1372–73. Ghei and Parisi explain the cascading consequences of this. They suggest that *Lex Fori* likely fuels trial lawyers and other interest groups in their quest for plaintiff-friendly laws, and the law can become even more "skewed in their favor." *Id.* They argue the "resulting legislation is 'made' law . . . giving rise to a 'made' order," which has a "tendency toward inefficiency" as a result of the "imperfect information and the influence of interest groups." *Id.* at 1373.

b. Case Study: Race to the Bottom

Race to the bottom analysis also provides an important exercise in projecting the long-term consequences of a regulatory scheme. One might start by observing that Conflict of Laws would not exist were it not for regulatory competition among governmental entities and by acknowledging that the cumulative effects of this competition can be both beneficial and detrimental to human governance. Understanding these effects can assist legal analysts in rating Conflict of Laws systems, allowing them to judge whether to replace the diverse, state choice of law approaches with a uniform, national (or federalized) choice of law approach.[30]

"Race to the bottom" generally refers to the tendency of interstate competition to decrease regulation to attract businesses.[31] This deregulation—the argument goes—threatens to reduce social welfare because states in a race to the bottom system serve their own self-interest to the detriment of the overall regulatory scheme.[32] Each state's desire to attract business (and avoid losing economic activity) provides an incentive for all states to deregulate. This deregulation can reduce social welfare because it encourages such measures as

30. *See* Solimine, *supra* note 26, at 627–28. For an important, early article on using this concept in Conflict of Laws teaching, see *id*. at 627.

31. *See, e.g.*, Louis K. Ligget Co. v. Lee, 288 U.S. 517, 557–58 (1933). The phrase appears to derive from a dissent by Justice Brandeis, describing the trend in weaker states to create less restrictive laws to attract corporations as a "race . . . not of diligence but of laxity." *Id.* at 559.

32. *Id.* at 557–59. The theoretical foundation for the race to the bottom is the "Prisoner's Dilemma." *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1217 (1992) (explaining the phenomenon). An example used to explain the Prisoner's Dilemma paradigm involves a prosecutor who separately interrogates two suspects, trying to get each to confess. *Id.* If neither suspect confesses, the prosecutor can obtain only limited success (say, a misdemeanor conviction with a ten-month sentence). *Id.* If only one suspect confesses, the prosecutor might offer that suspect a plea deal with a shorter sentence (say, three months). *Id.* The prosecutor could then seek a felony conviction for the non-confessing suspect and might obtain a longer sentence (say, twenty years). *Id.* If both suspects confess, they might be both convicted of a felony and receive a shorter, but still significant sentence (say, five years). *Id.* The paradigm generally posits that each suspect will confess to the crime because each suspect mistrusts the other and believes that confessing will be the safest option. *Id.* at 1218. For example, if a suspect refuses to confess, there is the chance that the other suspect will confess and leave the first suspect with the highest sentence of twenty years. *Id.* Though the outcome of confessing (either five years if both parties confess or three months if the other suspect does not) is better than the outcome of being the only party not to confess (twenty-year sentence), the best overall ("Pareto optimal") outcome for both suspects is to not confess at all (ten months). *Id.* In this model, the suspects' sole focus on the best personal outcome keeps them from cooperating so as to achieve the best overall outcome. *Id.*

permissive environmental laws, allowing increased pollution and prompting resident health problems.[33] Deregulation may benefit a state with increased revenue from new businesses and industries but can also harm the state's residents. The risk is that each state will act without regard for long term or collateral consequences. Obsessed with the idea that a failure to deregulate would lead to high costs (such as economic activity), the state does nothing to discourage other states from also deregulating themselves. If the states considered their actions in the aggregate—the argument continues—they might recognize that the optimum outcome is for all states to adopt an appropriately stringent standard of regulations.

Scholars have observed a particularly clear race-to-the-bottom dynamic in the evolution of products liability laws.[34] They observe that states have an interest in adopting pro-plaintiff products liability laws to protect their resident consumers.[35] On the other hand, however, states also want to attract new businesses and industries, and businesses prefer reduced liability levels so they need not increase prices to offset the cost of liability. Accordingly, states have an incentive to enact pro-defendant laws to attract more businesses.[36] Choice of law enters the picture because some choice of law principles prompt courts to apply pro-defendant laws more often than others, particularly since choice of law approaches differ in their degree of preference for a strong forum law default.[37] In today's mobile world, products do not remain where they are made, but are instead sold or shipped to many different states. This means that a consumer injured by a product likely has a choice to bring suit in the state in which she purchased the product, where the product was made, or where any of the parties reside. Each of those states could

33. *Id.*

34. *Id.* at 1251 n.136.

35. *Id.*

36. *See* Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 629–30 (1992); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1028–30 (1994) (explaining the dynamic).

37. *See, e.g.*, Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice of Law Well*, 2002 BYU L. REV. 759, 776–84 (2002) (reviewing the contribution of Conflict of Laws doctrine to fueling a race to the bottom).

have laws with differing levels of liability for the defendant producer. Assuming that plaintiffs do not encounter obstacles limiting where they can sue, they can file in the forum that will most likely apply the most pro-plaintiff law. The choice of law approach applied by the various jurisdictions will substantially dictate which of the jurisdictions is most likely to do so. For example, a state R resident, who purchases a product made in state P, could bring suit in either R or P. If state P has a more pro-plaintiff law and a choice of law approach oriented to applying forum law, a state R resident would have an incentive to file suit there. That option would allow the state R resident to take advantage of state P's pro-plaintiff law without purchasing the product there and without paying a higher product price made necessary because of the plaintiff-protecting nature of state P's product liability laws.

Cooperation can ensure the greatest outcome for all those subject to products liability regulation. However, each state might act in a self-serving manner with nothing binding each of them to act cooperatively. One possible lesson of this phenomenon is the advantage of a uniform choice of law approach—via federal directive or otherwise. Such uniformity might foster more efficient and effective legal regulation because plaintiffs would have less incentive to "shop" for the forum that is most likely to apply pro-plaintiff product liability principles.[38]

The underlying message of these theories is that difference among laws—and resulting competition—affects the decision-making and behavior of market participants—all of whom are potential actors in litigation and many of whom plan their activities in light of potential

38. *See* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2–16 (1991) (articulating an argument favoring a uniform choice of law code). Professor Michael Krauss has made a similar argument, advocating for a federal choice of law statute for products liability suits. Krauss, *supra* note 37, at 807. Professor Bruce Hay also advocates for a uniform federal law that controls the laws governing products liability suits. Hay, *supra* note 36, at 644–46. Like Krauss, Hay's approach tends to prevent consumers from avoiding less protective laws of defendant-friendly states without bearing the cost of the more protective regulation. *Id.* In contrast to Krauss, Hay focuses primarily on predictability and planning, arguing that governing law for a products liability suit should derive only from the state where the product was sold or where the producing company resides. *Id.* By limiting the governing law to these two states, Hay reasons, a business can better predict which laws will apply to disputes and can plan accordingly. *Id.*

lawsuits. Where this difference among laws can be eliminated—such as through a uniform choice of law code—the uniform law can account for and remediate possible deleterious consequences of underlying regulatory differences and competition.[39]

B. Legal Analytic Form

Some of the richest intellectual lessons arising from Conflict of Laws spring from the discipline's potential for exposing forms of legal analysis. Conflicts study can easily seize—and expose—matters tied to remarkable and sometimes unique qualities of the legal process, reasoning, and rhetoric. These striking qualities seem to result from the intractable nature of many Conflict of Law problems: there is simply no "right" answer to many of the power clashes presented in Conflict disputes. Some problems—such as the clash between state and federal law—contain a "tie breaker" that points to a ready answer, such as the Supremacy Clause of the United States Constitution.[40] More commonly, however, conflicting laws come from sovereigns of equal status. When this occurs, courts must draw on creativity to designate a rational "winner." Resulting analysis takes many forms: searching, clever, disingenuous, and even comical. These qualities of Conflict of Law opinions are disorienting for some. Yet all conflicts thinkers—scholars looking for a lens on the nature of law, practitioners seeking insights, Conflicts professors looking to enhance depth to their teaching, and others—can benefit from exploring the varying opinions. By appreciating and embracing the case law's quirks, legal thinkers develop a greater understanding of the legal process, the dynamics of the adversary system, and

39. Gottesman, *supra* note 38, at 39. Another topic for illustrating game theory topics concerns private incentives in judgment recognition. *Cf.* Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505, 508 (2010) (contrasting the incentives of sovereignties deciding whether to recognize foreign judgments with "the incentives of individuals to seek or avoid recognition of a particular foreign judgment"); Michael Whincop, *The Recognition Scene: Game Theoretic Issues of the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 425–28 (1999) (outlining forum shopping incentives deriving from recognition law). *See also* Marcel Kahan & Linda Silberman, *The Adequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 775 (1998) (addressing forum shopping, plaintiff shopping, and lawyer shopping incentives in class actions).

40. U.S. CONST. art. VI.

generally become more expert in the rhetorical and linguistic devices useful where human interaction requires lawyers to operate with subtlety, creativity, and sometimes even stealth or obfuscatory intent.

The notable analytical forms in Conflict of Laws cases are numerous. Here are four representative topics: intuition, framing effects, rules or standards choices, and complexity.

1. The Role of Intuition

Conflict of Laws analysis can be rough going. Properly applied, the discipline's rules and methodologies require rigorous mental gymnastics and double-your-trouble research (i.e., for any Conflict of Laws problem, one should study the scope and purposes behind the laws of at least two jurisdictions). That parties and judges quite often try to ignore the Conflicts issues that arise in litigation evidences this difficulty.[41] For these reasons, the temptation to invoke intuition to resolve Conflicts issues is strong.

Not that this inclination is particularly unusual: intuition plays an important part of life and decision-making. Intuition also forms a key component of the formalized rules that govern human affairs (the law) as well as the common sense necessary to provide competent legal representation. And sound reasons support this. Much good can be said for the chance to grasp a result without need for conscious reasoning. Intuition's mental approach resembles heuristics, which are essential for efficiency and speed in negotiating all that life serves up.[42] Also, intuition is often conveyed easily to others, including

41. SPILLENGER, *supra* note 12, at 109–10.

42. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 185 (2011). Kahneman does not condemn all intuitive judgments, as he praises intuitions that draw on "skill and expertise" and lead to "rapid and automatic" judgments. *Id.* While the work of Kahneman and Amos Tversky on this subject is perhaps best well known, a rich body of legal scholarly literature also explores the efficacy of intuition. This literature seeks to understand such questions as whether intuition is "non-rational" or illogical, whether judicial reasoning masks intuitive judgments, and whether intuition enhances the morality in decision making. *See, e.g.*, Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 523–24 (1998) (contrasting the process of reasoning with intuition); Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1024–31 (1996) (discussing limits of articulating standards and expectations about opinions reflecting a "conscious process of deduction"); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278, 285–87 (1929) (exploring the tension between accommodating intuition and the need to make a judicial opinion appear reasonable); Douglas Lind, *Logic, Intuition, and the Positivist Legacy of H.L.A. Hart*, 52

those who are legally trained and those who are not. Finally, intuition is extremely useful, perhaps essential, to the rule of law. An intuitive connection between what law is and the reasons behind the law can make law more effective. If legal rules make good "intuitive sense," then they are readily embraced by the governed—that is, citizens who must live by the rules.

Of course, prudence counsels against overreliance on intuition. One needs to be wary that intuition does not serve as an unfortunate "substitute [of] an easy question for [a] harder one."[43] Deep understanding does not emerge from what Daniel Kahneman might describe as "System 1" thinking—from which conclusions arise from automatic, stereotypic, emotional, and sometimes even subconscious impulses.[44] This is especially true for legal understanding. Law is a rigorous discipline, tied closely to formal logic and rationality. To competently navigate among legal doctrines and apply them to a given fact situation, one must sift through many facts and concepts, integrating relevant factors, checking for irrelevant ones, and the like. In other words, the competent legal analyst needs to muster plenty of "System 2" thinking—deliberative, effortful, and calculating thought.[45]

In charting the appropriate balance between intuition and deliberative thought, Conflict of Laws provides a particularly fertile medium. Why? Well, as suggested above, intuition's invitation to avoid the frustration of difficult, sometimes altogether incoherent, Conflicts doctrine can especially tempt one to ignore the benefits of formal legal analysis. Nonetheless, some measure of intuition may help navigate difficult cultural and value clashes that are reflected in legal differences highlighted by the choice of law processes.[46]

SMU L. REV. 135, 148–65 (1999) (exploring connections among logic, intuition, and legal formalism); R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1406–20 (2006) (describing various forms of judicial reasoning and its dependence on intuition).

43. KAHNEMAN, *supra* note 42.

44. *Id.*

45. *Id.* at 361.

46. *See* Annalise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273, 274–75 (2008) (describing how Conflict of Laws extends beyond analytical puzzles and requires a forum court to evaluate and understand a foreign value system).

Intuition might penetrate the effects of complex analysis, which can conceal power dynamics and subtleties reflected in laws with conflicting terms.

Two readily available Conflicts approaches useful for comparing intuition with lock-step legal analysis are the Center of Gravity approach[47] and Governmental Interest Analysis. Under the Center of Gravity approach, courts generally identify contacts that bear "weight and significance" in the dispute,[48] and apply the law of the jurisdiction that hosts the nucleus or gravity center of relevant contacts. Yet courts following the approach do not provide much guidance about which contacts matter, and which contacts do not, for the purposes of pinpointing the gravity center.[49] By contrast, Governmental Interest Analysis calls for step-by-step consideration of laws' goals, evaluation of contacts relevant to those goals, and determination of whether the dispute implicates those goals.[50] Many legal thinkers—particularly those new to Conflict of Laws—are especially drawn to Governmental Interest Analysis—perhaps (I hypothesize) because its resolution of false conflicts is so intellectually compelling.[51] But once one experiences the tortured reasoning that has proliferated in the name of Governmental Interest Analysis, its apparently constrained method starts to lose its shine, and the benefits of an intuition-driven approach may become more appealing.

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47. *See, e.g.*, *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961). The Center of Gravity approach is seen as a transition between the Restatement (First) of Conflict of Laws and more developed modern approaches. LITTLE, *supra* note 16, at 292–96. Indeed, New York courts have moved well beyond the orientation of *Haag*, but the court's reliance on intuition in reaching its result is hardly unknown in contemporary choice of law cases. *Id.* at 296–97. Consider, for example, the most significant relationship test of the Restatement (Second) of Conflict of Laws. *Id.* at 298.

48. *Haag*, 175 N.E.2d at 444.

49. *See, e.g.*, LITTLE, *supra* note 16, at 295–96.

50. *Id.* at 379. Indeed, one of the first expositions of Governmental Interest Analysis presents the approach in statute-like formality. *See* Brainerd Currie, *Comments on* Babcock v. Jackson*, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242–43 (1963).

51. *See, e.g.*, Currie, *supra* note 50 (applying the Governmental Interest Analysis). A false conflict is one in which only one jurisdiction (out of two or more) has an actual interest in applying its law—even though laws have nominally conflicting terms. Mzamane v. Winfrey, 693 F. Supp. 442, 468 (E.D. Pa. 2010). If anything comports with common sense, applying the law of the only interested jurisdiction certainly does.

2. The Debate About Rules and Standards: Formalism vs. Functionalism

Another debate about analytical reasoning presented in Conflicts decisions is the perennial dispute about the suitability of "rules" versus "standards" as instruments for governance.[52] The evaluation of the relative merits of various choice of law approaches invariably implicates the question of whether rules or standards govern more effectively.

Scholars define a "rule" as a "legal directive" requiring a decision-maker to reach a certain result upon finding the presence of certain triggering facts.[53] Some emphasize that rules "entail an advance determination of what conduct is permissible."[54] Rules enable formalistic decision-making, associated with categories defined by bright-line specifics. The First Restatement of Conflict of Laws is a rule-based approach.[55]

By contrast to rules, standards require that the decision-maker apply a "background principle or policy" to a set of facts before rendering a binding decision about the facts.[56] Standards allow the decision-maker to decide whether certain conduct should be allowed *after* the conduct has occurred and the court has evaluated the conduct's effect.[57] Standards implement functional decision-making, often associated with balancing tests, and promote reasoning by reference to the purposes underlying legal directives.[58] Modern

52. *See, e.g.*, Adam I. Muchmore, *Jurisdictional Standards (and Rules)*, 46 VAND. J. TRANSNAT'L L. 171, 175 (2013) (discussing jurisprudential rules and standards).

53. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (describing a rule as binding "a decisionmaker to respond in a determinate way to the presence of delimited triggering facts"). *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985) (conceptualizing legal rules as "a series of directives," where each directive has "a 'trigger' . . . and a 'response' that requires or authorizes a legal consequence when that [trigger] is present").

54. Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Kaplow's analysis is cited widely within legal scholarship.

55. *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

56. Sullivan, *supra* note 53, at 58. *See also* Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 623 (1999) (using the term "nonformalistic law" as synonymous with standards and defining standards as abstract concepts that "refer to the ultimate policy or goal animating the law").

57. Rosen, *supra* note 56, at 623.

58. Sullivan, *supra* note 53, at 60.

choice of law methodologies tend to promote standards-based decision-making, as reflected in the Second Restatement of Conflict of Laws, Governmental Interest Analysis, Comparative Impairment, and the Better Rule of Law approach.[59]

The rule-based approach to decision-making has been pilloried in the recent past, but has experienced a resurgence of support.[60] Proponents argue that rules reduce complex reasoning and constrain discretion, thereby promoting uniformity, efficiency, predictability, and even-handed justice.[61] Justice Antonin Scalia often propounds the virtues of rule-based decision-making, arguing that rules of law should be pre-announced so as to limit arbitrary authority and to minimize legal administration costs.[62] Not surprisingly, rule-based decision-making is popular among law and economics thinkers—one might even argue the rule-like quality of the Restatement (First) of Conflict of Laws accounts for its popularity among some law and economics thinkers.[63] One scholar has argued that the standard-based thinking reflected in Governmental Interest Analysis creates high transaction costs, which leads to "frequent forum preference and thus globally suboptimal outcomes."[64] Law and economics thinkers, however, have not reached consensus on the subject, and some celebrate the benefits of ad hoc adaptation made possible by standards.[65]

Although rule-based decision-making has gained in popularity, many are dubious of its merits, including those working in Conflict of Laws.[66] In particular, courts and scholars observe that its

59. *See generally* SPILLENGER, *supra* note 12.

60. *E.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

61. *Id.*

62. *Id.*

63. *E.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 806 (8th ed. 2010) (arguing that the First Restatement avoids multifactor balancing); Erin A. O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, *in* ELGAR'S ENCYCLOPEDIA OF LAW AND ECONOMICS, 637 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (praising the rule-like quality of the First Restatement, although advising that it be modified "to avoid frequent arbitrary results").

64. *See* Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73, 94 (2008).

65. *See id.* at 93–94 n.126; Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 45–46 (2001).

66. *See* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-*

simplicity is illusory, since the rigidity of rules can spawn exceptions and complexity.[67] The escape valves associated with the First Restatement provide evidence of this.[68] Moreover, once a judge decides to make an end run around a rule, judicial candor can suffer and complications multiply.[69] Take, for example, a court's decision to recharacterize a prenuptial agreement dispute as presenting a marriage issue, rather than a contract issue. The court making the recharacterization may be seeking to trigger the place of celebration's law so as to avoid an inequity that would arise if it applied the law of the place of making the contract to the specific case. What does this mean for the proper characterization for future prenuptial agreements where the inequity is not an issue? Should the court use a marriage characterization on the basis of precedent, or should the court distinguish the precedent and use a contract characterization?

In addition to pointing out deficiencies in rule-based decision-making, some proponents of standard-based decision-making affirmatively celebrate how the ad hoc nature of standards can make them effective regulatory instruments.[70] These thinkers argue that standards allow courts to do what courts do best: tailor the law to the specifics of the case to do justice.[71] From this point of view, the flexibility of the methodologies, such as the Second Restatement or the Better Rule of Law approach, makes it more likely that the approaches are better able to respond to the challenges of dueling jurisdictional claims to governing in the ever-changing world.[72]

Two scholars argue that one component of standards-based decision-making—balancing—is particularly well suited to choice of law.[73] They maintain that choice of law disputes require consideration of so many variables that a single "trigger factor"—

Alone Trigger, 95 IOWA L. REV. 1125, 1131–45 (2010).

67. *Id.*

68. *Id.*

69. *Id.*

70. Michael Faure, Morag Goodwin & Franziska Weber, *The Regulator's Dilemma: Caught Between the Need for Flexibility & the Demands of Foreseeability. Reassessing the* Lex Certa *Principle*, 24 ALB. L.J. SCI. & TECH. 283, 292–93 (2014).

71. *Id.*

72. *Id.*

73. Brilmayer & Anglin, *supra* note 66, at 1173.

such as under the First Restatement—is simply not up to the task.[74] Balancing, they suggest, allows a court to "tak[e] into account the number of contacts supporting a particular state's law" and results in minimizing the circumstances when laws are applied extraterritorially.[75]

I agree that formal rule-based decision-making may not be up for the challenges served up by Conflicts problems. But the dynamic, in my view, is complicated. One problem results from how rigidly rule-based approaches invite Conflicts thinkers to create numerous exceptions and provide incentives to "game" the rules. The result, ironically, leads to more complexity.[76] This leads to yet another irony, since a decision-maker who wants to make an end-run around the rules may have an incentive to avoid candor and clarity in explaining her decision. And that may not be the end of the story: even in the face of an apparent failure of rule-based decision-making to reduce complexity, attempts at creating more standard-based, functional approaches to Conflict of Laws may inspire an evolution back toward more rule-based formalism. As I have argued elsewhere, the emotional and cognitive appeal of rules lies in the elusiveness of their goal, and this allows adjudicators to continue to place faith in the virtues of a simple, rule-based decision-making system.[77] Even if these virtues are illusory, belief in the power of "impartial" rules may actually improve decision-making, contributing to a self-fulfilling prophecy because adjudicators put trust in the ability of rules to control and simplify their decision-making process.[78]

While the evolution of Conflict of Laws doctrine over the last fifty years might provide support for these arguments,[79] the debate about the efficacy of rules versus standards is certainly not complete.

74. *Id.*

75. *Id.*

76. Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 963 (2004).

77. *Id.*

78. *Id.* at 966–67.

79. *See, e.g.*, Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893, 900, 903 (Ill. 2007). In support of this, consider the tendency of courts to try to formalize the flexible, standards-based approach of the Restatement (Second) of Conflict of Laws. *Id.* (explaining the importance of adhering to the presumptive rule that place-of-injury should provide the governing law in a tort action).

Whether or not the debate is ever settled in the Conflicts context, understanding the merits of rules versus standards can assist in evaluating the overall merits of competing choice of law approaches. And of course the feedback loop continues: learned wisdom about the efficacy of various choice of law approaches continues to inform the debate about rules and standards.

3. Framing Effects and Characterization

I have celebrated the potential for Conflict of Laws to capitalize on framing effects many times.[80] The possibility that a particular characterization or frame on a particular fact pattern might change readily seems to me to be an opportunity for creative lawyering and developing an understanding of the nature of perception and knowledge. Alas, though, the terms "frame-shifting" or characterization might evoke not-so-good connotations, with some arguing that the initial frame or characterization on a particular topic can disproportionately influence outcome.[81] Thus, thought-manipulators or "spinners" profit from creating a favorable first impression to gain support from others, who do not necessarily understand the full truth of a matter.[82]

Despite these potential negative attributes, framing remains a core advocacy skill. The framing process has some unqualified, beneficial aspects as well: the process is key to understanding the impact of—and potential validity of—competing perspectives on a particular problem.[83] Effective legal thinkers need to know how to spin—or recharacterize—a legal issue to understand the nature of the legal process and to avoid others' distortions.

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80. *See, e.g.*, Little, *supra* note 76, at 929, 932; Laura E. Little, *Characterization and Legal Discourse*, 42 J. LEGAL EDUC. 372 (1996), *reprinted in* J. ASS'N LEGAL WRITING DIRECTORS 121, 121 (2009) [hereinafter Little, *Characterization*].

81. *E.g.*, KAHNEMAN, *supra* note 42, at 364. Daniel Kahneman is often associated with path-breaking work with framing—or as he describes it—the "influences of formulation." *Id.* Kahneman also warns against the "unjustified influences of formulation on beliefs and preferences" on "framing effects." *Id.* As Kahneman says, however, not "all frames are equal," and "some frames are clearly better than alternative ways to describe (or to think about) the same thing." *Id.* at 371.

82. Little, *Characterization*, *supra* note 80, at 121.

83. *Id.* at 135, 148.

Yet there is more to gain here than a rhetorical or advocacy skill. Study of characterization may also encourage legal thinkers to challenge categories and break out of "cabined" thinking and rigid taxonomies that are apparently common in legal doctrine. If one repeatedly sees that the rigid result of legal rules can be avoided by creative reframing, then she is more likely to develop confidence to avoid becoming a slave to choices forced on her by opponents or the popular conceptions. She is then freed to allow her own sense of justice to control over her legal analysis. Practice in questioning predetermined frames likewise empowers legal thinkers to reach a more sophisticated level of understanding, enabling them to deploy more creativity in solving legal and practical problems.

These, of course, are generic observations about perception, creativity, and law. What makes Conflict of Laws so interesting, however, is that characterization is so pervasive within the discipline. First, at least two choice of law approaches formally require framing (although they officially call the mental process characterization): both the Restatement (First) and the Restatement (Second) of Conflict of Laws require the legal analyst to first frame the legal issue in terms of substance and procedure—and if substantive—then according to doctrinal category (property, tort, contract, and the like).[84] Even beyond this type of formal invitation to characterize, conflicts cases seem to create an endless stream of informal characterizations. Consider, for example, definitional questions about words incorporated from one part of a statutory scheme to another: could it be possible that his partner is a "spouse" for the purpose of the domestic relations law but *not* the probate code?[85] Is charitable immunity a loss allocating rule or a conduct regulating rule?[86] The type of thinking required to frame these questions is common in all forms of lawyering, whether it be counseling, brief-writing, arguing, negotiating, or interacting with the press. Yet, the struggles for a

84. Little, *supra* note 76, at 932–33.

85. *See, e.g.*, *In re* Estate of May, 114 N.E.2d 4, 6 (N.Y. 1953), in which the court interpreted New York's Domestic Relations law for the purpose of answering a probate question.

86. Shultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 685 n.2 (N.Y. 1985) (analyzing whether New Jersey meant for its charitable immunity law to be loss allocating or conduct regulating).

reasoned basis for choosing between relevant laws of co-equal sovereigns provides especially fertile ground for proliferating different frames and perspectives.[87]

4. Complexity

Conflict of Laws also presents a valuable opportunity to view the benefits, detriments, and possible inevitability of complexity that so often occurs in thoughtful legal regulation. Simplicity in law is a sound goal: simplicity ensures that law is more accessible to the governed and is thus more likely to govern effectively. Indeed, readily understandable legal principles are more likely to appear coherent and well grounded, and thus are more capable of garnering respect and emotional attachment than Byzantine rules. One would expect that such legal principles are more likely to ensure that citizens actually obey the law. Yet, for Conflict of Laws, simplicity proves a particularly elusive goal. The discipline is prone to abstract distinctions, multiple meanings, and filigreed structures of analysis. Why is this? As with other areas of law such as tax or civil procedure, legal complexity results at least in part from the desire to ensure that law is thorough and fair. Several other more discipline-specific explanations suggest themselves: the multi-jurisdictional

87. *See generally* O'CONNOR, *supra* note 26. A particularly striking example of framing with large consequence concerns marriage. Questions regarding the validity of marriage are treated as choice of law matters, for which there is a lot of leeway in identifying an acceptable solution in those instances where one jurisdiction has a different public policy regarding marriage validity than the jurisdiction where a marriage was celebrated. *See generally* Grossman, *infra* note 101, at 435. If, on the other hand, marriages were regarded as judgments, a jurisdiction seeking to refuse to recognize a marriage would have much less leeway than they presently do because there is no public policy exception for recognition of judgments under the Full Faith and Credit principles in the United States. *See* Fauntleroy v. Lum, 210 U.S. 230, 237–38 (1908) (refusing to recognize an exception to judgment recognition based on the recognizing jurisdiction's view of the illegality of the claim underlying the judgment). The proposition that a marriage might be treated as a judgment is not preposterous. *Cf.* Grossman, *infra* note 101, at 435. After all, marriage often involves an exercise of judicial authority. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2708 (2013) (questioning how choice-of-law would apply to validity of same-sex marriages). In addition, an asymmetry on marriage status exists in U.S. law: although the creation of marriage is not treated as a judgment, the dissolution of marriage—divorce—is treated as such, thus triggering plenary full faith and credit protection. For further discussion of the status of judgments in the U.S. legal system, see *infra* notes 93–98 and accompanying text. Of all the exertions of governmental power in the United States, judgments are a category that we treat with particular care. Judgments are subject to full faith and credit's iron rule: full faith exerts the greatest protective force on judgments. U.S. CONST. art. IV, § 1.

context of Conflicts, the common law system and litigation context in which Conflicts questions arise, reluctance of lawmakers and judges to candidly discuss their exercises of power, American legal culture's preference for detailed explicit rules and specific authority for proposed action, and the unusual influence of academics in the development of Conflicts doctrine.[88]

The complexity of Conflicts may help inspire commentators to invoke the "dismal swamp" metaphor often used in connection with the discipline.[89] Legal complexity is certainly not a cause for celebration. Yet, the process of understanding complexity's causes—and of acknowledging that some complexity may be an inevitable consequence of an impulse to be fair and precise—provides valuable instruction on the nature of law.

C. Preference for Judicial Power: Cult of the Robe

A useful message emerges from comparing the mode and rigor of regulation within the three different components of Conflict of Laws: personal jurisdiction, choice of law, and judgments. Two of these components concern judicial power (personal jurisdiction and judgments), while the third primarily concerns what is generally viewed as law-making or legislative power (choice of law). The rules within those components that concern judicial power have more rigor and rigidity than the component concerning law-making power. Does this suggest a preference for judges over legislators?

First, some definitions: by rules with more "rigor and rigidity," I refer to a number of things. Initially, I note that the source of the rules governing personal jurisdiction and judgments is United States constitutional principles, while the source of the choice of law rules in the United States is nearly always state common law—or to a limited extent—state statutory law. The United States Supreme Court has enunciated loose constitutional restrictions on what state courts can do in the choice of law arena, but the constitutional restrictions

88. These causes are explored in detail in Little, *supra* note 76.

89. *See, e.g.*, Symeon C. Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029 (1987).

have a light touch and are rarely mentioned in state choice of law cases.[90] Yet, the Supreme Court has tried again and again in the personal jurisdiction area to articulate specific rules for state courts exercising power over out of state defendants.[91]

Even more remarkable, however, has been the Court's traditional treatment of judgments.[92] Of all the exertions of governmental power in the United States, judgments are a category handled with particular care.[93] To begin with, judgments are subject to full faith and credit's iron rule: a judgment in one court is entitled to same sanctity and effect as it would receive in the court that rendered the judgment.[94] The Supreme Court has recognized a few exceptions to this principle over the years—particularly where personal jurisdiction and subject matter jurisdiction problems infect the judgment.[95] But these exceptions are limited and certainly do not include the type of indulgence for the honoring court's public policy that one sees in the choice of law area.[96]

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90. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion) (requiring only that the Constitution requires that a "[s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

91. *See e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 315–19 (1945); Pennoyer v. Neff, 95 U.S. 714, 722–33 (1877). In case after case leading up to Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987), the Court attempted to refine personal jurisdiction contacts analysis. *Id.* After *Asahi,* the Court enjoyed a several-decade hiatus in personal jurisdiction decision-making. *Cf.* Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846 (2011) (deciding personal jurisdiction limitations post-*Asahi*). The Court, however, has focused on the issue again and decided a number of personal jurisdiction cases in recent years. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115 (2014); J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); *Goodyear*, 131 S. Ct. 2846 .

92. *See, e.g.*, *Fauntleroy*, 210 U.S. at 237.

93. *Id.* at 232 (discussing the grant of judicial power granted by the Constitution).

94. Stewart E. Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts About* Thomas v. Washington Gas Light Co., 69 GEO. L.J. 1329, 1332 (1980).

95. Baker v. Gen. Motors Corp., 522 U.S. 222, 223 (1998).

96. *See id.* at 233 (stating that there is no "public policy exception" for judgments); *Fauntleroy*, 210 U.S. at 237–38 (refusing to recognize an exception to judgment recognition based on the recognizing jurisdiction's view of the illegality of the claim underlying the judgment). Judgments of foreign countries do not receive full faith and credit treatment, and generally enjoy a bit less respect in U.S. courts than do domestic judgments. U.S. CONST. art. IV, § 1, cl. 1. In fact, some contexts even reveal considerable evidence of disrespect where the foreign judgments do not reflect U.S. policy choices. *See, e.g.*, SPEECH ACT of 2010, 28 U.S.C. § 4102 (2013) (prohibiting recognition of foreign judgments that do not comply with freedom of communication principles as reflected in the First Amendment of the U.S. Constitution and as reflected in the law of the state of the United States in which the judgment is sought to be enforced and recognized). Nonetheless, foreign judgments do enjoy greater respect in U.S. courts than foreign law as a general matter, which, if considered at all, will be honored only if choice of

So why the solicitude for judgments? Perhaps one can trace this to an Anglo-American reverence for courts. In United States government and culture, judges are treated very well—we put them in special robes, elevate them onto benches, call them "Your Honor," grant them special contempt powers, and allow them to dispatch many of their governmental duties in secret. Moreover, their orders are protected by the collateral bar rule, requiring parties to challenge orders through appeal only and subject themselves to punishment for contempt if in fact they choose to disregard an order without pursuing an appeal.[97] One explanation for this special regard for judgments might posit that judicial orders draw a line in the sand: commanding specific parties to do specific things. In this way, the judicial orders actually implement the rule of law itself. It is here, at the point of a judicial decision when the court applies general principles to individual behavior, where government makes absolutely clear that the law applies to specific citizens, and that the citizens' failure to comply with the law dangerously flouts governmental power. Hence, the strict rules governing recognition of judgments: to venerate and protect this judicial exercise of governmental power—the tailoring of legal principles to individual conduct—preserves the rule of law itself.

II. USING CONFLICT OF LAWS TO EXPOSE FEDERALISM'S REALITIES

Legal thinkers in the United States often view Conflict of Laws as a federalism problem.[98] The dominant perspective sees Conflicts as confronting almost exclusively interstate relations issues, exposing a morass of clashing state laws roughly supervised by federal constitutional guarantees. Thus, a rich body of scholarship, treatises, and casebooks explores various U.S. state laws and techniques for

law analysis suggests that it is the most appropriate law to apply. For an overview of the treatment of foreign law and foreign judgment in U.S. courts as the law of a sister state, see Little, *supra* note 16, at 191–94, 963–68, 984–87 (2013).

97. John R.B. Palmer, Note, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, 88 CORNELL L. REV. 215 (2002).

98. *See, e.g.*, Little, *supra* note 76.

resolving conflicts among them.[99] That said, there remain important federalism angles on the material that may be usefully mined for salient and enlightening insights on the discipline. One contemporary angle is highly focused: the topic of same-sex marriage. The other topics that promise to clarify the dynamics of federalism in the United States are less subject-specific. These concern (1) the modes of regulation among the constituent parts of a federalist union and (2) the lessons arising from federalism's creation of forum choice for litigants. I explore these immediately below.

A. Same-Sex Marriage: A Paradigm of Federalism's Power Struggles?

Few would doubt that in contemporary times, same-sex marriage has created one of the most powerful case studies in federalism. Same-sex marriage presents a diverse cross-section of state laws: marriage-equality laws, marriage-recognition laws, state public policy statutes prohibiting marriage recognition, and laws providing marriage "equivalents," such as domestic partnerships and civil unions. From a federalism perspective, this diversity presents enormous challenges. On the one hand is the pressure to recognize a marriage valid in the place where it was celebrated. The stakes are high with marriage recognition: emotional stability, children, inheritance, health care, taxes, and other myriad spousal rights all hang in the balance. Common sense compels a strong orientation toward uniformity: persons validly married in one jurisdiction should be deemed validly married everywhere. On the other hand are the moral and religious differences that same-sex marriage implicates. One of federalism's virtues is its ability to allow diversity to flourish. From this perspective, federalism should strive to accommodate a peaceful coexistence of diverse views as they are reflected in wildly varying laws promulgated by a diverse citizenry. This presents two horns of a dilemma: should uniformity or diversity carry the day? Is there a consensus, or half measure, that can keep the peace? Here lies

99. *See, e.g.*, LITTLE, *supra* note 16.

a central function of Conflict of Laws: to provide a reasoned mechanism for resolving differences among states, for tolerating diversity, and for promoting respectful interstate relations.

Existing literature covers same-sex marriage in great depth. Although the literature might connect same-sex marriage issues with Conflict of Laws more fruitfully than it has done, many scholars have done so.[100] Same-sex marriage deserves highlighting, not only for its inherent importance, but also for its ability to illustrate federalism's many dimensions. With a rapidly occurring series of decisions striking down same-sex marriage bans as unconstitutional, we are approaching a threshold where same-sex marriage debates may have historical interest only.[101] Nonetheless, the parallels between struggles over same-sex marriage and historical struggles over slavery deserve attention. Marriage is a status defined by state law, just as slavery was a status defined by state law.[102] Contemporary controversy still surrounds whether, and to what extent, the federal government should reach beyond its umpiring functions and inject federal principles to resolve same-sex marriage controversies.[103] Same-sex marriage's historical analogue with slavery is far from direct, but the federalism parallels are striking and deserve contemplation.

The Conflict of Laws history of governing same-sex marriage disputes is enlightening. At the time the Restatement (First) of Conflict of Laws was written in the 1930s, the drafters likely did not anticipate how its rules might apply to same-sex marriage issues. In fact, the same-sex marriage movement did not become widespread until the 1970s.[104] Once the movement took hold, legal principles

100. *See, e.g.*, Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 434–35 (2005) (evaluating relevance of Full Faith and Credit Clause to marriage recognition).

101. *See, e.g.*, *Searcy ex. rel. K.S. v. Strange*, No. 14-0208-CG-N, 2014 WL 4322396 (S.D. Ala. Aug. 28, 2014).

102. Grossman, *supra* note 100, at 434–35 (discussing recognition of state laws in relation to same-sex marriage); Jane E. Larson, "*A House Divided": Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577, 578–79 (1996) (outlining choice of law treatments of slavery as a human status).

103. *See* Grossman, *supra* note 100, at 436, 454–55 (discussing the application of the Full Faith and Credit Clause to same-sex marriage recognition uniformly across state lines).

104. *See* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then*

such as the Restatement (First) rules, more modern choice of law rules, and myriad other laws needed to be interpreted, reinterpreted, challenged, and sometimes discarded as issues arose regarding the legitimacy and effect of unions between individuals of the same sex.

Whenever social, political, or technological change occurs, existing legal rules must accommodate—sometimes dramatically. The same-sex marriage movement produced particularly far-reaching consequences because marriage has so many aspects in human society and individual existence. First and foremost, marriage reflects rules regarding partner selection. While many of those rules are informally defined and culturally enforced, some—such as those regarding age of consent to marry—are codified.[105] Other aspects of marriage include (1) procedures for formalizing the partners' commitment to the marriage[106] (including licensing as well as civil and religious wedding rituals); (2) the economic and financial rules for forming a partnership, running a household, owning property, and rearing children; and (3) the principles and procedures governing dissolution[107] (including dissolution either by reason of death and volition). Because the United States' family law system treats marriage as a legal status, rather than a contractual relationship, partners do not have the prerogative to enunciate all of their own rules governing their marriage.[108] Rather, they must accept rules prescribed by law and culture. Indeed, their decision to "marry" includes a decision to be bound by preexisting rules, which accompanies a request that the government grant imprimatur on the marriage union.

The mosaic of laws governing same-sex unions in the United States created a rat's nest of chaos and confusion. Adding to the uncertainty, state laws became a moving target, frequently changing

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and Now, 82 S. CAL. L. REV. 1153, 1165 (2009) (citing June 1969 as the "birth of the modern gay rights movement").

105. *See, e.g.*, O.C.G.A. § 19-3-2 (2010).

106. *See, e.g.*, O.C.G.A. § 19-3-30 (2010).

107. *See, e.g.*, O.C.G.A. § 19-5-1 (2010).

108. *See* Nora Flum, *Constituting Status: An Analysis of the Operation of Status in Perry v. Schwarzenegger*, 33 WOMEN'S RTS. L. REP. 58, 80 (2011) ("Marriage is constituted as a status, not contractual, relationship, and it is this legal status that gives it social status (rank).").

as American society struggled toward equilibrium on the issue. Moreover, as the lives of transgendered individuals have become visible, additional issues have arisen as laws wrestled with issues raised by gender transitions, gender reassignment surgery, and ambiguous gender.

Conflict of Laws issues arise from all these aspects of marriage. Many legal issues, including property ownership, rights to spousal benefits, and inheritance, turn on the question of whether a marriage is valid. This question often presents courts with the task of deciding which set of state law rules governing validity should prevail. If, after evaluating competing laws, a court determines that the governing law validates the marriage, then the court next must determine how that status affects the particular matter in dispute. (So, for example, a determination that two individuals are married can result in the court's awarding inheritance rights to a putative spouse rather than a child of the deceased.) Overlaid on the choice of law issue on marriage validity is the question of marriage recognition. Even though a jurisdiction may not deem a marriage valid under its own laws, the jurisdiction may choose nonetheless to recognize another jurisdiction's view that the parties are married. Why would a jurisdiction extend such recognition? Several important motivations could be at work: deference to a sister state, understanding of the need for uniformity of legal regulation, or respect for the individual rights of parties who are claiming the status of spouses.

But of course state choice of law principles are not the end of the story. Fundamental individual rights, protected by the United States Constitution, also have a crucial role to play in Conflict of Laws. Privacy, consensual sexual relations, and marriage are all components of human life and society, which the Constitution protects.[109] Same-sex marriage not only presents important issues relating to accommodating difference in state laws, but also presents a compelling case study of federal supervision of state laws. Enter the

109. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965) ("The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'").

concept of federal supremacy. As of now, the United States Supreme Court has tread carefully, but the Court's decision in *United States v. Windsor* suggested that the Court is willing to grapple with the issue head on, and that Court has now provided itself with an opportunity to do so very soon.[110] And finally is the umpiring function of the federal government as reflected in the Full Faith and Credit Clause of the Constitution's Article IV. This provision does not address directly the rights of the individuals, who wish to enjoy the status of being married, but instead regulates the structure of government. Stipulating the deference due from one state to the legal prerogatives of another state, the Full Faith and Credit Clause thus directly regulates the circumstances under which one state must recognize a marriage celebrated and solemnized in another state.[111] While well studied by scholars in and out of the same-sex marriage context,[112] the Full Faith and Credit Clause is an important component of understanding the federalism dynamics intrinsic in domestic Conflict of Laws issues.

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110. 133 S. Ct. 2675 (2013). Specifically, the *Windsor* Court ruled that the federal Defense of Marriage Act's restriction violated individual rights of those married under state law recognizing same-sex marriage:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Id. at 2696.

On January 16, 2015, the Court consolidated four same-sex marriage cases and granted a writ of certiorari in these cases limited to the following questions:

> 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

Obergefell v. Hodges, No. 14-556, 2015 WL 213646, at *1 (U.S. Jan. 16, 2015); Tanco v. Haslam, No. 14-562, 2015 WL 213648, at *1 (U.S. Jan. 16, 2015); Bourke v. Beshear, No. 14-574, 2015 WL 213651, at *1 (U.S. Jan. 16, 2015).

111. *See generally* Grossman, *supra* note 100.

112. *See, e.g.*, Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954) (describing obligation of one court to enforce land decrees entered by another court); Grossman, *supra* note 100 (evaluating relevance of Full Faith and Credit Clause to marriage recognition); Sterk, *supra* note 94 (evaluating Full Faith and Credit principles in the context of workers' compensation decrees).

B. Loci and Modes of Regulation: Laboratories of Experiment

Same-sex marriage provides an informative view on the diversity of normative judgments about state law matters informing a Conflict of Laws thinker's understanding of federalism. Same-sex marriage, of course, is just one example of a topic for which U.S. laws represent diverse viewpoints. Other varying policies and goals reflected within state law range from tort, contract, and property to probate and procedure.[113] On a more macro level, academics, judges, regulators, and students also stand to learn a tremendous amount about styles and modes of regulation. Indeed, one of the most salient qualities of the federalist system is the diverse styles and approaches states embrace in regulating a social problem. The approaches can vary in how states choose to allocate authority between state and local governments.[114] States might also diverge in how they interpret the scope of federal law in a particular area. Additionally, upon recognizing the need for law to protect against a particular social harm, different jurisdictions shape regulatory policy in different ways. For example, states may choose administrative law, civil law, or criminal law mechanisms to address a particular problem—or a combination of all three.[115] Differences in approach to procedural or remedial mechanisms, such as class action apparatus, can create significant choice of law issues as well.[116]

Public health scholarship reflects a robust understanding of how state regulations often vary according to whether they take an interventional approach or a less direct route to curing a problem through such methods as tax incentives or infrastructure changes.[117]

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113. See *supra* notes 14–20 and accompanying text for discussion of the opportunity to evaluate regulatory goals.

114. See *infra* note 122 for a discussion of the difference between Pennsylvania and New York in regulating hydraulic fracturing in the Marcellus Shale.

115. For an example of how a state's decision to regulate using the criminal law, but not the civil law, can influence choice of law analysis, see Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976).

116. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (resolving dispute over differences between New York and federal class action rules).

117. James Macinko & Diana Silver, *Improving State Health Policy Assessment: An Agenda for Measurement and Analysis*, 102 AM. J. PUB. HEALTH, 1697, 1697 (Sept. 2012) (contrasting direct interventional regulation with regulation that focuses on incidental laws and laws that affect infrastructure). For further illustrations of the divergent approaches that states take to public health

Likewise, public health scholars have also observed a pattern whereby some states comprehensively legislate to regulate a particular problem, while others take a more incremental approach.[118] One might imagine, for example, myriad Conflict of Laws problems pertaining to sports-related, traumatic brain injury. Questions might include: who bears liability for the brain injury, whether a "clearance to play sports" decision was reasonably given in a particular circumstance, and whether institutional policies and training are adequate.[119]

A different, although equally informative, illustration of federalism dynamics emerges from the controversy over regulating hydraulic fracturing in the Marcellus Shale by Pennsylvania and New York.[120] In terms of regulatory conflict, the controversy implicates the regulatory power of no less than three states, the federal government, and a trans-jurisdictional regulatory entity.[121] This type of hybrid

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regulation, see www.lawatlas.org (providing a policy surveillance portal for public health regulation). This contrast in regulatory approach is also reflected in divergent approaches to regulating hydraulic fracturing in the Marcellus Shale by Pennsylvania and New York. See *infra* note 122 for further discussion of hydraulic fracturing in the Marcellus Shale.

118. Macinko & Silver, *supra* note 117, at 1698 (discussing differences in comprehensiveness in state regulation of such problems as automobile crashes, tobacco use, and alcohol addiction).

119. Hosea H. Harvey, *Reducing Brain Injuries in Youth Sports: Youth Sports Traumatic Brain Injury State Laws, January 2009–December 2012*, 103 AM. J. PUB. HEALTH 1249 (July 2013) (surveying dramatic variations on state regulatory response to youth traumatic brain injuries). *See also* Hosea H. Harvey, *Refereeing the Public Health*, 14 YALE J. HEALTH POL'Y L. & ETHICS 66 (2014).

120. *See infra* note 122.

121. *See* Ross H. Pifer, *What a Short, Strange Trip It's Been: Moving Forward After Five Years of Marcellus Shale Development*, 72 U. PITT. L. REV. 615, 616 (2011); Lynn Kerr McKay et al., *Science and the Reasonable Development of Marcellus Shale Natural Gas Resources in Pennsylvania and New York*, 32 ENERGY L.J. 125, 126 (2011). The story of hydraulic fracturing in the Marcellus Shale is long and tortuous. Here is a short version, made possible by the excellent research assistance and drafting of Bradley Smith (Temple Law School Class of 2015): In 2008, state and local governments in Pennsylvania and New York were forced to confront the regulation of the natural gas industry after an improvement in drilling technology offered the opportunity to tap into natural gas deposits in the Marcellus Shale. Pifer, *supra* at 627–32. Both states sought policies that would allow for economic growth while protecting the environment; however, the respective approaches that New York and Pennsylvania took varied greatly. McKay, *supra* at 126. Pennsylvania pursued what may be viewed as an incremental or reactionary approach: as certain issues arose, Pennsylvania enacted solutions tailored specifically to the problems caused by increased natural gas drilling. Pifer, *supra* at 658. At first, Pennsylvania's most prominent changes were increased supervision of the industry through more inspectors and clarifying regulations. McKay, *supra* at 132–33. In 2012, Pennsylvania adopted a plan enabling individual counties to choose to levy a designated impact fee on natural gas extraction, rather than implement a state-wide severance tax as is used in other natural gas drilling states. Kris Maher, *Impact Fees Fracture Pennsylvania*, WALL ST. J. (Apr. 28, 2013), http://online.wsj.com/news/

regulation is common in the present era, and surely deserves a place in contemporary thinking about Conflict of Laws.[122]

C. Forum Shopping Springs from Diversity

Federalism's diversity in regulatory style and procedure creates an unintended consequence: the incentive to forum shop. While forum shopping is routinely regarded as a blight on procedural systems, the truth is that the Conflict of Laws discipline tacitly teaches lawyers how to forum shop and encourages them to do so. Those mastering Conflicts doctrines become keen to the strategic advantages of evaluating substantive and procedural differences among jurisdictions. Such is the reality of many types of "lawyers' law": insiders who understand law's complicated underbelly also know how to exploit it. An ethical response is to sensitize lawyers to the inequities caused by diversity among jurisdictions, which are reinforced and enhanced by forum shopping practices. In short, forum shopping behaviors deserve thought and attention. While Conflict of Laws scholars have extensively studied various aspects of forum shopping within the last few years,[123] more general research

articles/SB10001424127887323551004578438982990838720?mg=reno64-wsj.

By contrast, New York chose to regulate through an expansive moratorium on natural gas drilling early in the Marcellus Shale boom. McKay, *supra* at 128. In contrast to Pennsylvania, New York declined to enact smaller bits of legislation periodically. *Id.* at 127–28. New York's Department of Environmental Conservation had begun to revise requirements for permitting natural gas drilling when the New York legislature and executive took preemptive actions to temporarily eliminate all drilling in the state. *Id.* at 128. New York has treated the Marcellus Shale controversy as a uniquely state issue, concluding that the state can dictate to cities and towns what they may do. Peter J. Kiernan, *An Analysis of Hydrofracturing Gubernatorial Decision Making*, 5 ALB. GOV'T L. REV. 769, 781–82 (2012). Whereas Pennsylvania enacted narrow legislation and deferred to localities for some matters, New York took broad action at the state level.

This topic also presents interesting implications for the scope of federal governance. On one hand, not readily apparent, controlling federal authority exists because the National Safe Drinking Water Act excludes hydraulic fracturing (a matter of ongoing debate). Pifer, *supra* at 644. Nonetheless, eastern Pennsylvania and a small part of New York are regulated by the Delaware River Basin Commission, a regional commission established by the governors of Pennsylvania, New York, New Jersey, Delaware, and the federal government. *Id.* at 642 n.179. The Delaware River Basin Commission has imposed a de facto moratorium on drilling in the area it regulates, which affects Pennsylvania much more than it does New York. *See* McKay, *supra* at 131–32. Therefore, Pennsylvania currently submits itself to federal control more than New York does.

122. *See, e.g.*, McKay, *supra* note 121; Pifer, *supra* note 121.

123. *See, e.g.*, Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from* Shady Grove, 44 CREIGHTON L. REV. 29, 32 (2010) (using venue transfer as an example of procedural mechanisms

would benefit world procedural systems. Moreover, the topic could have a greater role to play in Conflict of Laws courses and other thinkers—such as legislators, practicing lawyers, and judges—are well advised to consider its prevalence and consequences.

From a legal practice perspective, Conflict of Laws cases have a dominant message: the forum where a lawsuit is filed enormously influences which party ultimately succeeds.[124] A particular forum can provide practical, logistical, and procedural advantages for one litigant and potentially serious disadvantages for others. Simple matters as familiarity with layout of a courthouse building, knowing where to get documents duplicated, and enjoying the comfort of sleeping in one's own bed during a protracted trial can impact litigation success. Likewise, forum courts tend to favor applying their own law governing the rights of the parties to a lawsuit.[125] This choice of law influence on litigation's bottom line can be huge.

As the litigants who file the papers initiating suit, plaintiffs exert considerable control over where a lawsuit is filed.[126] The consequences of forum choice give plaintiffs an incentive to shop far and wide for the place that delivers the optimum balance among convenience, reduced legal barriers to litigation, favorable substantive legal regulation, and helpful court procedures. One might justify the prerogative of forum choice as an appropriate trade-off for the burden that plaintiffs must generally bear in proving the elements of their case. That does not, however, dismiss further consideration of the consequences of forum choice.

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that work with *Erie* to expand opportunities for forum shopping); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1116–17 (2010) (discussing reaction of other countries to what may be viewed as the U.S. courts' aggressive use of forum manipulation tools such as forum non conveniens); Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339 (2008) (analyzing how differences among adjudicatory results in different jurisdictions can distort trade and investment behavior); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (presenting findings on forum shopping trends).

124. Whytock, *supra* note 123, at 498.

125. *Id.* at 493.

126. *See, e.g.*, Borchers, *supra* note 123.

Plaintiffs encounter at least one formidable check on their ability to file in an optimum forum: personal jurisdiction restrictions.[127] Competently represented defendants are unlikely to waive personal jurisdiction challenges, and courts tend to take seriously the constitutional minimums required for asserting personal jurisdiction. On the other hand, in today's mobile and globally integrated world, defendants often have contacts that provide a constitutionally sufficient basis to support personal jurisdiction in several jurisdictions. Together with a lawyer's increased ability to litigate outside her home jurisdiction, this increased ability to maneuver around personal jurisdiction limitations makes forum shopping a reality now more than ever.[128]

Forum shopping may involve a number of alternatives: the choice between United States courts and courts of foreign countries, the choice among courts of foreign countries, the choice between federal courts in the United States and state courts in the United States, and the choice among different state courts in the United States. Phenomena such as libel tourism[129] outside the United States and the status of the United States as a magnet forum[130] for many types of litigation provide important case studies on the interaction of world procedural systems and inequities in standards of justice. Yet focus on domestic, U.S. forum shopping alone discloses important lessons.

Not only do the details of forum shopping give realism and currency to Conflict of Laws issues, but these details are important to understanding of the consequences of routine law practice and a large range of matters pertinent to regulatory reform. An informed decision about what, if any, preventative action to take against forum shopping requires appreciation of the forces that create the practice as

127. STEPHEN C. YEAZELL, CIVIL PROCEDURE 110–11 (Vicki Been et al. eds., 8th ed. 2012).

128. Whytock, *supra* note 123, at 492–93.

129. For analysis of the incentive for libel plaintiffs to file suit outside the United States, see generally Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, 14 EUR. Y.B. PRIVATE INT'L L. 181 (2012) (surveying libel tourism developments and the reaction of the United States); Daniel C. Taylor, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189 (2010) (focusing on free speech ramifications of libel tourism).

130. *See generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 294–95 (6th ed. 2010) (using "magnet forum" to describe foreign plaintiffs' attraction to U.S. courts).

well as the reasons why it is generally condemned. Some contexts for forum shopping present easy judgments: consider, for example, a party's decision to litigate in a particular jurisdiction to benefit from the jurisdiction's widespread corruption. Certainly this is not a forum shopping practice deserving of respect. In most cases, however, the causes and effects of forum shopping are more subtle and complicated, and the decision whether government should actively seek to ward off its occurrence may require fine-tuned evaluation of specific facts.

For the purpose of evaluating the federalism implications of forum shopping, one must understand that litigant incentives and strategic behavior do not operate alone. Forums themselves may host (or encourage) forces that attract or repel litigation.[131] These forces relate to matters such as (i) a desire to foster economic benefits in a particular locale or a particular population group within the locale; (ii) cultural characteristics reflected in court systems that prefer one type of litigant over another; (iii) local preferences for greater or lesser damages; and (iv) intended or unintended byproducts of regulatory schemes. Sometimes these forces combine to empower particular jurisdictions to lure court filings for a disproportionate percentage of cases in a particular category.

1. Choices Among Federal Courts

Within the United States, a variety of forums attract specific cases and litigants. Take the unlikely example of a small Texas town, Marshall, Texas, with an impressive record for attracting patent litigation: in 2005, its United States District Court entertained more patent lawsuits than federal district courts in San Francisco, Chicago, New York City, and Washington.[132] What's the draw of Marshall, Texas? The answer seems to be a rocket docket combined with plaintiff-friendly verdicts.[133] What's the apparent benefit for the town? Increased real estate investment and greater business for hotels

131. Whytock, *supra* note 123, at 498.
132. Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, § 3, at 1.
133. *Id.* at 9.

and restaurants.[134] Marshall, Texas, is not alone. In a wholly different context, analysts have also pointed out a possible economic incentive at work as jurisdictions considered whether to recognize same-sex marriage.[135] This would seem particularly true of jurisdictions with an established tourism infrastructure, which would benefit from out-of-state citizens, traveling to marry and then honeymoon in the same-sex marriage jurisdiction.[136]

Disclosing similar findings, scholars have identified powerful forces within the federal system that render specific judicial districts more attractive to bankruptcy filings than other districts.[137] Indeed, this bankruptcy venue issue has proven a lightning rod for controversy—well known to bankruptcy scholars and practitioners—but has not been widely linked with larger policy issues of forum shopping and Conflict of Laws.[138]

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134. *Id.* at 8. Another notable example of a forum known for plaintiff-friendly verdicts is Texarkana, Texas, which provides unique opportunities for forum shopping within the same locale. DISCOVER OUR TOWN, http://www.discoverourtown.com/AR/Texarkana/Attractions/172184.html (last visited October 27, 2014) (explaining that Texarkana is home to "[t]he only federal building in the country sited in two states and the only federal courthouse located in two circuits, the 5th and the 8th, and two districts, the Eastern District of Texas and the Western District of Arkansas").

135. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 780–86 (1995) (analyzing economic incentives for states to recognize same-sex marriage).

136. *Id.* at 769–72.

137. *See, e.g.*, Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 402 (2006) (reporting on observations that "[a] high repeat filing rate first afflicted two 'magnet' venues, the District of Delaware and the Southern District of New York, then spread nationwide as other judges have tried to attract cases to their own courts").

138. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 137 (2005). In writings inspiring considerable controversy, Professor Lynn LoPucki has argued that United States bankruptcy courts compete fiercely with each other, resulting in a dramatic chain of consequences stemming from forum shopping:

> [C]ourt competition is an active, deliberate response by the court to forum shopping. When courts compete, they change what they are doing to make themselves more attractive to forum shoppers. . . . The court that offers forum shoppers the most may be the only one that gets cases in the end, but all of the judges who compete are corrupted along way.

Id.

Why do judges compete so aggressively for bankruptcy cases? LoPucki cites judicial desire for prestige, professional satisfaction, and self-preservation. Lynn M. LoPucki, Response, *Where Do You Get Off? A Reply to Courting Failure's Critics*, 54 BUFF. L. REV. 511, 512 (2006) (reviewing arguments about why bankruptcy judges are under pressure and how they respond to the pressure). According to LoPucki, judges wish to appease powerful members of the bankruptcy bar and the business community—who act as "case placers"—so that the judges can attract big, interesting cases to their venues. *Id.* at 513. Moreover, since bankruptcy judges are not appointed for life, they depend for their

2. Choices Among State Courts

Forum differences and resulting forum shopping are not confined to federal courts. Indeed, the differences are equally pronounced for litigants choosing among state courts.[139] Not only are some states more attractive to plaintiffs (and less attractive to defendants) than others, but specific locations—counties, cities, and towns—can garner nationwide reputations among litigants. For example, the United States Chamber of Commerce periodically evaluates state liability systems, scrutinizing factors such as treatment of class actions, punitive and other damages, timeliness, discovery and evidentiary policies, judges' impartiality and competence, as well as jury predictability and fairness.[140] Surveying attorneys' opinions about these matters, the Chamber identified strong jurisdictional preferences, including fine-tuned preferences that distinguished among different counties and cities within states.[141] In addition, states also develop reputations for expertise in specific subject matters, whether they be corporate law (Delaware), entertainment matters (New York and California), insurance law (Connecticut), or another subject.[142]

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reappointment on the support of the local bankruptcy bar, particularly powerful members of the bar, who influence where cases are filed and benefit from practicing in a forum with robust bankruptcy activity. *Id.* LoPucki argues that the judges compete for more bankruptcy business by making rulings that affect professional fees, trustee appointments, conflicts of interests, and taxes—matters that are sufficiently important to the business community and bankruptcy bar to influence where bankruptcy petitions are filed. *Id.* at 514–15.

It should be noted that many of LoPucki's claims are contested by other bankruptcy scholars. *See, e.g.*, William C. Whitford, *Venue Choice: Where the Action Is*, 54 BUFF. L. REV. 321, 321–22 (2006). His observations, however, raise important concerns about how self-interest and power can be tied to the ability of litigants to forum shop.

139. Hay, *supra* note 36, at 620.

140. Humphrey Taylor, *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, 2007 U.S. CHAMBER INST. FOR LEGAL REFORM 6–8.

141. *Id.* at 18. The respondents ranked Delaware, Nebraska, and New Hampshire as "best" in their treatment of tort and contract litigation and West Virginia, Louisiana, and Mississippi as "worst." *Id.* at 21. In addition, they zeroed in on Los Angeles, California, and Chicago/Cook County, Illinois, as the cities and counties with the least fair and reasonable litigation environment. *Id.* at 18.

142. *See, e.g.*, Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 698 (2008) (Delaware); CONN. INS. L.J., http://insurancejournal.org/?page_id=17 (last visited Oct. 27, 2014) (Connecticut); Kirk T. Schroder, *Entertainment Law: Some Practice Considerations for Beginners*, 13 ENT. & SPORTS L. 8, 9 (1996) (California & New York).

Aside from explicit differences in procedural and substantive laws, states can also be more or less attractive to litigants because of non-law related factors such as infrastructure. Consider, for example, instances where a jurisdiction might offer a substantive legal advantage for high stakes trials, but, for various reasons, does not provide the "brick and mortar" comforts that usually accompany such events. In one case, a Walt Disney Company shareholder trial in downstate (Georgetown) Delaware required big city lawyers to create temporary offices in old houses and beach hotels, a task that included paying to upgrade electrical systems to accommodate the high-tech photocopiers and other equipment.[143] Presumably Georgetown, Delaware, presented a dilemma for the lawyers: judicial subject matter expertise, infrastructure support, and attorney comfort all hung in the balance.[144]

3. Choices Between State and Federal Courts

And of course there are classic forum shopping issues raised by diversity of citizenship jurisdiction in federal courts and the *Erie* doctrine.[145] While this is perhaps the most well-known and well-studied example of forum choice, several subtle—yet potentially important—issues usually escape attention. Of particular note for the Conflict of Laws theorist are the consequences of the rule that a federal district court must apply the choice of laws rules of the forum state to resolve state law conflicts.[146] Could this rule actually exacerbate forum shopping by allowing federal procedural mechanisms to expand a litigant's possibilities for benefitting from favorable state laws?[147] At least one scholar has pointed out that *Erie*

143. Maureen Milford, *Big-City Lawyers on the Road Scrape for Office Space*, N.Y. TIMES, Nov. 17, 2004, at C6.

144. *See id.*

145. Borchers, *supra* note 123, at 30.

146. *Id.* at 30.

147. *Id.* at 32 (using venue transfer as an example of procedural mechanisms that work with *Erie* to expand opportunities for forum shopping); *see also* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 139–40 (2011) (noting that for class litigation, *Erie* and differences among state choice of law doctrines increase forum shopping incentives).

may have actually increased horizontal forum shopping[148] by eliminating a uniform "general law" that prevailed under *Swift v. Tyson*.[149] A related subtlety concerns how differences in state and federal stare decisis policies can encourage forum shopping.[150] Some suggest that differences in how federal and state courts view state court precedent can make federal courts more attractive than state courts, where a litigant seeks to benefit from likely, but not yet formalized, legal changes.[151]

Yet a final, related, and frequently overlooked forum shopping phenomenon concerns the obligation of state courts to apply federal law, which is sometimes called the "reverse-*Erie*" problem.[152] While definitions of the reverse-*Erie* issue vary, one helpful approach confines the reverse-*Erie* doctrine to matters bearing on the conduct of litigation, embracing the view that the doctrine simply requires state courts to apply federal practices that are closely interwoven with "the relevant federal claim, despite the existence of conflicting state procedures."[153] Under reverse-*Erie*, a lawyer's forum shopping opportunities may be expanded, since the lawyer can use a state system while benefitting from federal practice rules, even though the

148. Sherry, *supra* note 147, at 138–39. "Horizontal" forum shopping refers in this instance to choosing among federal district courts situated in different states. *Id.*

149. 41 U.S. 1 (1842). *See* Sherry, *supra* note 147, at 141 (arguing that lack of uniformity between state and federal court is worse under *Erie* than under *Swift* because federal courts under *Swift* had developed a body of "cohesive and coherent" general laws).

150. JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES & EXPLANATIONS 218 (Aspen Publishers 5th ed. 2006).

151. *See, e.g.*, *id.* at 227–28 (arguing that federal district courts have more latitude in anticipating changes in the law than state courts, which must follow strict stare decisis policy in adhering to a decision of a state supreme court).

152. *See* Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1251–61 (2011) (discussing a parallel phenomenon relating to state courts' obligations to follow the law of other states and pointing out that states often do not follow this obligation faithfully and instead indulge the dubious assumption that a foreign state's law is the same as forum law). Professor Green's observations raise the specter of even greater incentives for forum shopping among state courts. *Id.*

153. Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1232 (2011). Other definitions of the reverse-*Erie* doctrine are broader, encompassing the mandate that "federal law—be it constitutional, statutory, or common law—will apply pursuant to the Supremacy Clause in state court, subject to the Constitution or Congress having already chosen the applicable law, whenever it preempts state law or whenever it prevails by an *Erie*-like judicial choice of law." Kevin Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 44 (2006).

federal court system would clearly be available because the suit arises under federal law.[154]

In sum, forum shopping is a complex phenomenon, implicating "micro" concerns, such as hotel space and electrical capacity at real estate surrounding courthouses, as well as "macro" concerns such as judicial corruption, global economic performance, stare decisis policy, and the effects of cross-border transactions on the power of national governments.[155] Forum shopping is intimately tied to Conflicts of Law and, as such, deserves significant attention from Conflicts analysts. Perhaps the myriad variables influencing litigation success are so complicated and interdependent as to render foolhardy a lawyer's attempt to account for them all. Nonetheless, these factors merit close scrutiny, especially where they implicate a key part of litigation success—such as the opportunity to avoid highly unfavorable governing law by changing the applicable choice of law analysis, the possibility to benefit from potential changes in state law, or the possibility to change the identity of the fact-finder (judge or jury).

III. USING CONFLICT OF LAWS TO EXPLORE GOVERNMENT IN THE GLOBAL ERA

In the United States, we conceptualize Conflict of Laws most often as a domestic matter. This could hardly be described as a misconceived travesty: with the different laws of fifty states, territories, local governments, and a federal government, the United States faces a significant challenge managing domestic conflicts. One also can argue that a nation's success depends first on its ability to keep its own house in order. Accordingly, our nation's primary focus on creating effective mechanisms for resolving internal clashes among domestic laws is both defensible and rational. But to ignore the relationship among the laws of various nations forgoes an

154. *See* Clermont *supra* note 153, at 44.

155. *See, e.g.*, Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS. 101 (2008) (discussing these macro concerns in the context of contractual choice of forum and choice of law clauses).

important opportunity to understand sovereign power struggles as well as cultural differences among the world's people. Moreover, the transnational forces that influence litigation behavior of international actors reveal important insights into the variety of national procedural systems. Understanding these transnational forces not only educates U.S. thinkers about practices in the rest of the world, but also provides insights into the nature of the U.S. system. Finally, situating Conflict of Laws within an international frame brings out puzzling, yet fundamental, questions about the relationship among Conflict of Laws and other forms of international law as well as the nature of sovereignty itself.

A. Transnational Conflicts: Globalism in a Traditional Context

By design, Conflict of Laws envisions competing governmental systems. To concentrate solely on domestic regulatory competition suggests a parochialism that is out of step with contemporary individual, government, and business behavior. One need only consider the magnitude of internet activity conducted across borders to appreciate the importance of understanding transnational Conflicts principles. In terms of pedagogy, law practice, and legal scholarship, confining Conflicts thinking to domestic problems sends the wrong message about the relationship of the United States with the rest of the world.[156]

Lawyerly and scholarly focus on legal conflicts among different nations provides an opportunity to appreciate varying modes and styles of regulation. The result may be a better understanding of the various incentives and goals of various laws. With this understanding, more harmonious relationships—commercial or otherwise—may develop. A focus on other countries' laws may also educate judges, lawyers, and academics in the U.S. about aspects of

156. For a discussion of the importance of raising globalism topics in the classroom, see generally Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL'Y REV. 457 (2013); Catherine Valcke, *Global Law Teaching,* 54 J. LEGAL EDUC. 160 (2004).

alternative systems that lawmakers might favorably borrow or imitate for improving domestic U.S. regulation.

The topics through which Conflicts thinkers might study transnational differences are vast. As an example, I begin with one topic particularly important to legal professionals: the (frequently overlooked) Conflict of Laws issues pertaining to regulating lawyers engaged in transnational law practice. Not only does this topic relate to important professional responsibility concerns arising from multijurisdictional practice, but it also brings to light the variety of modes of lawyer regulation throughout the world. Might the United States learn from focusing on these differences? As legal practice globalizes and the market for U.S. legal services continues to suffer, should we consider following the trend toward deregulation of lawyers embraced in the United Kingdom? Alternatively, might we consider a national uniform regulation of lawyers—as is evidenced in many legal systems around world—or a licensing approach similar to the U.S. scheme for driver's licenses—as evidenced by the lawyer licensing scheme used in Canada.[157] At the very least, focus on this variety in regulation might educate U.S. lawmakers about the current insularity of U.S. lawyer regulation and the competitive advantages enjoyed by foreign lawyers operating under more liberal licensing schemes.

Appreciating the variety of lawyer licensing schemes may have important professional and economic consequences for United States lawyers. In the context of litigation, however, those issues tend to provide a sideshow distraction, rather than the "main event" for controversy. Transnational issues also repeatedly pop up in the core of legal disputes. Although courts sometimes explicitly consider these transnational conflicts using standard choice of law analysis,[158] that choice of law analysis is frequently lacking. A particularly

157. RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 5–10 (2013) (describing various countries' approaches to lawyer regulation and the liberalization of regulations in England and Wales).

158. *See, e.g.*, Dominican Republic v. AES Corp., 466 F. Supp. 2d 680, 693 (E.D. Va. 2006) (using the First Restatement approach to consider whether Virginia, Florida, Puerto Rican, or Dominican law governs a tort claim).

salient example of ignoring choice of law analysis comes from cases in which U.S. courts consider the unilateral (self-focused) question of whether a U.S. regulatory scheme applies to a case with transnational elements—cases presenting so-called questions of extraterritorial application of United States law.

In a series of opinions, the United States Supreme Court has developed a set of principles for extraterritorial application cases, laying out concepts governing when federal law should apply to entities and conduct outside the territorial limits of the United States.[159] While these cases present essentially the same problem as a typical multilateral Conflict of Laws case with domestic and foreign elements, the opinions barely hint at this overlap.[160] Instead, they speak from a hegemonic or empire model: unilaterally asking whether the United States wants to—and can get away with—applying its law to the dispute.[161] Even if one were to reject any notion that the United States "owes" other sovereigns careful consideration of conflicting regulations using traditional Conflict of Laws doctrines, one might surely accept that Conflicts doctrines might enhance the quality of justice extended to litigants in individual cases.

Choice of law analysis involving foreign country laws does more than instruct on alternatives to domestic law. As argued by several scholars, choice of law analysis can assist in appreciating the cultural implications inherent in legal and political clashes, perhaps setting the stage for greater acceptance—or peaceful co-existence.[162] This is

159. *E.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (evaluating the Securities Exchange Act of 1934); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (evaluating the Sherman Act); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (evaluating Title VII).

160. *See* cases cited *supra* note 159. Instead, the opinions mention standards for extraterritorial jurisdiction, including concerns with the location of conduct, participant nationality, domestic effects, and comity. While these are concepts closely related to Conflict of Laws, the Court has neither recognized nor capitalized on the connection. *See* cases cited *supra* note 140.

161. *See, e.g.*, *Morrison*, 561 U.S. 247 at 250–51 (deciding that statutory language and indications of statutory intent were not sufficient to justify regulating foreign activities); *Hartford Fire Ins. Co.*, 509 U.S. at 769–70 (relying on principles of "international comity" to justify regulating foreign conduct).

162. Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273, 273–75 (2008). Riles suggests that Conflict of Laws confronts human problems that extend beyond analytical puzzles pertaining to political power, sources of formal authority, and individual rights. *Id.* at 274–77. Pointing out that Conflicts grapples with cultural clashes, she observes that a forum court confronting a Conflicts

a point important for domestic relations cases, which often implicate sensitive cultural and moral issues that may or may not be unique to the societies in which they arose.[163] And, of course, looming large is the well-documented, yet still evolving, context of internet regulation—a context in which the appropriate form of Conflict of Laws doctrines is still a matter of debate.[164]

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case must evaluate and understand a foreign value system, a value system responsible for a legal rule in variance with domestic law. *Id.* at 274–75. Riles notes that cultural value clashes appear in "seemingly exotic disputes," such as fights about enforcing "agreements stemming from Islamic banking practices," as well as in more "mundane" state tort litigation. *Id.* at 275. Riles observes that cultural conflicts are generally "submerged" in standard choice of law doctrine. *Id.*

163. *See generally* Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012) (exploring the usefulness of Conflicts doctrine in the domestic relations context); Reynolds, *supra* note 6 (outlining the pedagogical benefits of teaching international family law in a general Conflict of Laws course).

Of particular interest is the question of how the formal structure of Conflicts doctrine (particularly as manifest in judgments law) interacts with the cultural, moral, and emotional issues triggered by family law. Does the formal structure of Conflicts doctrine in this area provide a good vehicle for harnessing the challenges of domestic relations law? Does it empower courts to handle questions of culture clash with detachment and precision? Alternatively, is there a bad fit between conflicts and domestic relations law: with conflicts doctrine obscuring the "real battle" in the cases, confusing the issues, or creating a smoke screen for subterfuge?

164. The literature on this important and difficult subject is appropriately wide-ranging and extensive. Although I believe it merits further extensive study, many scholars, regulators, and practitioners appreciate that message. I thus do not devote space here for further discussion of the topic. One particularly salient debate in the literature concerns whether the internet calls for a special form of regulation, reduced regulation, or existing forms of regulation. For a cross-section of existing writings, see, for example, Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313 (2013) (outlining unique personal jurisdiction and choice of law concepts for analyzing disputes involving cloud technology); Laura E. Little, *Internet Choice of Law Governance*, China Private Int'l Law F. (2012), *available at* http://ssrn.com/abstract=2045070 (arguing that internet governance issues require heightened attention and consideration of specialized rules); Little, *supra* note 129, at 186–87 (discussing how courts sometimes invoke standard choice of law methodology to internet defamation cases); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1823 (2005) (observing tendency of courts to apply local law in transnational cyberspace disputes); Andrea Slane, *Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet*, 71 LAW & CONTEMP. PROBS. 129, 130 (2008) (stating that "courts in Internet cases almost always confine conflicts issues to the exercise of . . . personal jurisdiction . . . [and] virtually never engage in a full conflicts analysis"); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1376 (1996) (advocating a flexible, open ended view of cyberspace governance).

B. Conflict of Laws and International Law: Why Entirely Separate Channels of Regulation?

A related and important, yet strangely uncharted, context for Conflict of Laws thinking concerns the discipline's interaction with international law. Both Conflict of Laws doctrines and international law contribute to a coordinated system of governance monitoring the world's affairs, affairs that include matters as complicated and interrelated as nuclear energy, internet communication, human migration, and climate change. Yet their relation to each other is under-theorized.

Both disciplines track each other in important ways. For example, classic international law doctrines include theories of jurisdiction (jurisdiction to adjudicate, jurisdiction to prescribe, and jurisdiction to enforce)[165] that dovetail closely with the tripartite nature of Conflict of Laws (personal jurisdiction, choice of law, and judgments).[166] Both Conflicts and international law regulate the same basic problems. How far does a court's adjudicative power reach? What are the appropriate circumstances under which one jurisdiction's policies should dominate another? When is it appropriate for a jurisdiction to impose its resolution of a dispute on another jurisdiction? Yet, while these two subjects could inform and guide each other on these issues, discussion of the overlap between the two is largely absent: the relationship between Conflict of Laws and international law remains elusive. One important task for Conflict of Laws thinkers therefore is to situate Conflicts doctrines within or alongside the broad scope of international law. Both disciplines would stand to benefit from the effort.

One explanation for the silence about the relationship between Conflicts and international law may be that international law tends to escape precise definition. This results perhaps because international law is vast, comprising at least three sets of principles and rules:

165. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (describing these three categories of jurisdiction).

166. *See generally* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 3 (West 4th ed. 2004) (explaining the three components of Conflicts: personal jurisdiction, choice of law, and judgments).

(1) those that operate among nations;[167] (2) those that govern entities interacting across national borders; and (3) those that sometimes govern relationships that exist between a nation and entities within its borders. Conflict of Laws is narrower.[168] In fact, when Conflict of Laws doctrines regulate interactions among different nation states, the subject is usually regarded as a subset of international law.[169]

We generally regard the term "private international law" as a synonym for Conflict of Laws doctrines operating in a transnational setting. The reference to "private" in "private international law" evokes the distinction between public and private spheres of international law,[170] which is now thought inaccurate and outmoded by many scholars.[171] The distinction still remains in current use, however, in many places in the world.

General international law principles are more sweeping than Conflict of Laws doctrines in other ways. Conflict of Laws doctrines generally presume that some domestic law principle should provide the central source of authority for dispute resolution.[172] The task of Conflicts principles then is to identify which domestic authority should prevail where various domestic rules irreconcilably clash. International law sometimes takes this task as its mission. But international law also has greater aspirations, such as identifying universal norms of human governance and establishing supranational

167. International law thinkers often use the more general term "states," rather than "nations"—nomenclature that potentially raises confusion for those working primarily with choice of law in the United States.

168. *See* SCOLES, *supra* note 166, at 2–4.

169. *See* Craig Scott, *"Transnational Law" as Proto-Concept: Three Conceptions*, 10 GER. L.J. 859, 869 n.16 (2009) (noting Conflicts doctrines take on the label "private international law," where they operate across national borders). Within a federalist system, the relationship among the component sovereigns—e.g., "states" in the United States, "provinces" in Canada—is regulated by domestic Conflict of Laws principles that do not usually have much "international" about them. *Id.*

170. *Id.* For an articulation of the distinction between private and public international law, see MARK WESTON JANIS, INTERNATIONAL LAW 2 (Aspen 5th ed. 2008) (explaining that public international law "mostly concerns the political interactions of states" and private international law relates to "conflicts and cooperation among national legal systems").

171. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1040 (2011) (stating that a private international law approach is "outdated").

172. *See* JANIS, *supra* note 170, at 5. Sometimes domestic law may point to international law as the source of authority, although this occurs less in the United States than in the European Union and elsewhere. *Id.* at 4.

institutions. In some instances, these institutions and norms are designed to operate alongside the laws of nation states to have a vertical relationship with them. Some advocate that international law may have the effect of harmonizing domestic laws or creating hybrid principles.[173] Nonetheless, the ultimate result may allow international law to dominate and suppress national law in the name of a superior international norm—and not—as in the usual Conflict of Laws context—in the name of peaceful horizontal relationships among nation states.

As discussed above, Conflict of Laws principles are most often creatures of common law. By contrast, international law has a variety of sources. One view confines international law to principles identified by consent among sovereigns, memorialized in treaties or other formal instruments.[174] Most, however, agree that custom also gives rise to international legal principles.[175] The absence of principles such as universal norms and custom in Conflict of Laws analysis may be an important contrast, calling for further thought.

Within the United States, state law is the major source of Conflict of Laws doctrines, even where a choice of law dispute involves the law of a foreign nation.[176] United States constitutional principles embodied in the Full Faith and Credit Clause and the Supremacy Clause provide some supervision of state choice of law doctrines. The presence of these U.S. constitutional principles highlights another important point about the relationship between international law and Conflict of Laws: circumstances exist when international law displaces Conflicts doctrines. The Supremacy Clause establishes that, where applicable, U.S. treaty provisions must direct states to resolve relevant Conflicts questions in a particular way.[177] Accordingly, international law instruments can displace otherwise applicable state law Conflicts principles. Finally, certain types of international law

173. *Id.* at 5 (explaining that rules of international law blend "various forms of rulemaking conduct of two or more states").
174. *Id.*
175. *Id.*
176. *Id.* at 7.
177. *See* YEAZELL, *supra* note 127, at 64.

principles, known as *jus cogens*, preemptory, or nonderogable norms, act as "super law" that can override other sources of international law.[178] Examples of *jus cogens* rules include prohibitions against war crimes, genocide, slavery, and torture.[179] Where the result of a domestic Conflict of Laws analysis might implicate a *jus cogens* prohibition, one would expect Conflicts principles to yield to the *jus cogens* principle, which the international community would regard as a more fundamental tenet of human governance.

Despite differences between Conflict of Law doctrines and international law, Conflicts thinkers should consider the synergy and benefits that international law and Conflicts offer each other. After all, Conflict of Laws doctrines and international law concern very much the same question: what is the appropriate relation among laws? Scholars have recognized that both Conflicts and international law have "rules that determine whether a case with links to more than one jurisdiction is governed by the law of the forum or the law of one of those jurisdictions."[180] We see that international law may "trump" Conflicts principles where those principles insufficiently protect *jus cogens* principles or clash with an international instrument such as a treaty. But perhaps Conflicts thinkers should consider other ways in which the discipline might learn from, and thus benefit from, international law. For example, Conflicts thinkers might consider whether to incorporate into Conflicts doctrines themselves a set of universal norms previously identified in international law that may serve as tie-breakers in cases of irreconcilable conflict between domestic laws.

As for the benefits that Conflicts doctrine offers international law, domestic courts might find that Conflicts principles provide a formal, rigorous, and often familiar way for them to consider and respect international law, regarding it as true law, but without "simplifying"

178. *See, e.g.*, DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS (3d ed. 2010) (describing peremptory or *jus cogens* rules).

179. EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 58–60 (3d ed. 2009).

180. Karen Knop, Ralf Michaels & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 AM. SOC'Y INT'L L. PROC. 269, 271 (2010).

it "by characterizing it . . . as domestic law."[181] Scholars observe that Conflict of Laws brings a "wealth of experience" to inform debates about the role of international law in domestic courts.[182] Calling the technical nature of Conflict of Laws doctrine "a strength" and not a "shortcoming," these thinkers maintain that Conflicts provides a structured technique for "thinking through problems of legal, political and cultural relativism."[183]

We see then that although both international law and Conflict of Laws have much in common, the two fields don't "talk" to each other enough. Here lies an opportunity for Conflict of Laws scholars and regulators: to initiate dialogue with international law thinkers as well as possible joint ventures.

C. Uncharted Territory: Sovereignty or Other Ways of Conceptualizing Governance and Identity

Finally, I propose that Conflicts thinkers travel into relatively new, uncharted territory. Specifically, I see the discipline as capable of expanding beyond concepts of governmental sovereignty, so as to conceptualize alternative, potentially more effective units, through which humans might relate to each other. Are sovereign nations or states the best way to conduct group interactions? When we think of rights, disputes about rights, and modes to ensure preservation of rights, should we focus solely on governmentally constituted courts and potentially clashing legislative principles? Or should we conceive some different kind of unit for group interaction and rights protection? Is Conflict of Laws learning useful only for umpiring clashes of one sovereign government against another? Might it also be useful for negotiating clashes among non-state actors?

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181. *Id.* at 270.

182. *Id.* at 271.

183. *Id.* Other scholars are not so sanguine about how useful currently constituted conflict of law doctrine can be in world governance. For example, Professor Horatia Muir Watt argues the choice of law, personal jurisdiction, and judgment recognition doctrines within international criminal law need to be reconstituted to avoid manipulation by private actors and to provide meaningful global governance. Horatia Muir Watt, *Reshaping Private International Law in a Changing World*, CONFLICT OF LAWS.NET (April 2, 2008), http://conflictoflaws.net/2008/guest-editorial-muir-watt-on-reshaping-private-international-law-in-a-changing-world/.

Governments are proving increasingly inept at erecting electronic borders.[184] This suggests that humans are in the process of developing communities—through social media or otherwise—that have become so expansive and powerful that they are evolving into autonomous entities, entities that might take on a role of "legitimate" norm definition. What is the role of Conflicts in this evolution? Conflict of Laws confines its role simply to negotiating new clashes among "legitimate" norms? Conflicts thinkers develop deep experience with identifying modes and purposes of regulation—as well as with evaluating and protecting procedural systems. Perhaps they might deploy this expertise in guiding these communities as they form and develop.

A catalyst for encouraging new non-state communities (and enhancing their status) may come from changes in the concept of national citizenship. On this topic, a rich literature has developed that challenges traditional concepts of citizenship, asking whether citizenship is no longer relevant in today's world.[185] Regardless of whether citizenship will soon disappear as a defining concept of world governance, contemporary conceptions of citizenship have evolved, and now include diverse elements such as "status, rights, political engagement, and identity."[186] What will be the role of this broad concept as transnational communities become more robust?

Consider contemporary clashes over citizenship, which test both the definition of citizenship itself as well as a population's tolerance for diversity. A particularly salient example pertains to laws restricting *burqa* and *niqab* wearing on French territory: French authorities have suggested that *burqa* or *niqab* wearing may reflect a woman's rejection of core French values, justifying the government to refuse the woman citizenship status.[187] This position coincides

184. *See, e.g.*, Little, *supra* note 164, at 3 (explaining that "despite the internet's increasing integration into modern life, the debate about internet governance has not resolved").

185. *See, e.g.*, LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (Princeton University Press 2008); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (Oxford University Press 2008); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009); Berman, *supra* note 164.

186. BOSNIAK, *supra* note 185, at 20.

187. Siobhán Mullally, *Civic Integration, Migrant Women and the Veil: At the Limits of Rights?*, 74

with national policy agendas implementing "integration testing" seeking to erect barriers to citizenship for immigrants.[188] Might not the policy and systemic sensitivities that permeate choice of law doctrines help to navigate clashes of this type?

As a discipline, Conflict of Laws relies heavily on the concept of domicile. For example, domicile triggers First Restatement vested rights and strong government interests under Governmental Interest analysis.[189] Domicile is also prominently listed as an important connecting factor in myriad Second Restatement sections,[190] and is a well-litigated status.[191] Conflict of Laws has an extensive record for handling attempts to manipulate domicile as well as policy clashes on the topic.[192] As such, the discipline possesses expansive learning to contribute to debates about the role of domicile, residency, and citizenship in contemporary life.[193] This could prove enormously useful as the world adapts to new forms of group interactions and inevitable clashes that occur.

CONCLUSION

The genesis of Conflict of Laws is debated, with some scholars finding its origins in Ancient Greece and others placing its roots in the Middle Ages.[194] However one comes down on this debate, no

MOD. L. REV. 27, 28–29 (2011).

188. *Id.* at 28–29.

189. Whytock, *supra* note 123, at 494.

190. *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (listing domicile as a connecting factor for choice of law decisions in general tort cases); *Id.* at § 150 (listing domicile as a presumptive connecting factor for choice of law decisions in multistate defamation cases); *Id.* at § 188 (listing domicile as a connecting factor for choice of law decisions in general contract cases).

191. For a particularly thoughtful, well-researched decision on domicile, see Mzamane v. Winfrey, 693 F. Supp. 2d 442 (E.D. Pa. 2010). The *Mzamane* case concerns a case of alleged multi-jurisdictional defamation, one of many instances where the law of the plaintiff's domicile is often outcome determinative. *Id.*

192. *See In re* Dorrance's Estate, 163 A. 303 (Pa. 1932) (holding John Dorrance died domiciled in Pennsylvania); *In re* Dorrance's Estate, 170 A. 601 (N.J. Prerog. Ct. 1934), *aff'd mem.*, Dorrance v. Thayer Martin, 176 A. 902 (N.J. 1935) (holding John Dorrance died domiciled in New Jersey). These cases provide a lesson against gaming the concept of citizenship and domicile.

193. *Mzamane*, 693 F. Supp. 442. The *Mzamane* case depicts how classic domicile principles can negotiate the transnational realities of modern life. *Id.*

194. *See generally* SCOLES, *supra* note 166 (outlining historical debate).

doubt exists that the discipline has survived, developed, and served civilization for a long time. Its doctrines are sometimes technical and highly abstract. With the recent cascades of changes in technology, society, legal doctrine, theory, and law practice, a historically rooted, technical discipline may seem out of step with the challenges of modern life. Yet mechanisms for navigating differences among societies and legal systems are the *essence* of modern life. What Conflicts brings to these challenges is not only experience and age, but also a forthright recognition that law is imbued with cultural and political realities. Conflicts of Laws doctrines add discipline, structure, and respect to some of the most challenging legal issues of our time. With its wisdom and experience, Conflict of Laws is poised to provide guidance—and has the potential to lead the way in re-conceptualizing (and resolving) contemporary power clashes. The feedback Conflict of Laws offers up may not always be clear; nor will it be necessarily perfect. But it will be disciplined, structured, and supported by time-tested reasoning. There's not much more that one can expect from mere mortals' law.